RESTRICTIVE COVENANTS AFFECTING LAND.

W. A. JOLLY.

5/-

343.6
JOL

VALUABLE LAW WORKS

PUBLISHED BY

STEVENS AND SONS,

LIMITED,

119 & 120, CHANCERY LANE, LONDON, W.C.

Russell's Treatise on Crimes and Misdemeanors.—*Seventh Edition.* By WILLIAM F. CRAIES and L. W. KERSHAW, Barristers-at-Law. *Three Vols. Royal* 8*vo.* 1909. *Price* 4*l.* 10*s. cloth.*

Carver's Treatise on the Law relating to the Carriage of Goods by Sea.—*Fifth Edition.* By R. A. WRIGHT, Barrister-at-Law. *Royal* 8*vo.* 1909. *Price* 1*l.* 18*s. cloth.*

Lush on the Law of Husband and Wife within the Jurisdiction of the King's Bench and Chancery Divisions. By C. MONTAGUE LUSH, K.C., Barrister-at-Law. *Third Edition.* By W. HUSSEY GRIFFITH, Barrister-at-Law. *Demy* 8*vo.* 1910. *Price* 25*s. cloth.*

Blackburn on Contract of Sale.—A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise. By LORD BLACKBURN. *Third Edit.* By WILLIAM NORMAN RAEBURN and LENNARD CHARLES THOMAS, Barristers-at-Law. *Royal* 8*vo.* 1910. *Price* 25*s. cloth.*

Farleigh's Manual of Commercial Law.—By E. AUSTIN FARLEIGH, Barrister-at-Law. *Demy* 8*vo.* 1910. *Price* 9*s. cloth.*

Thatcher & Hartley's Law of the Road.—Being a Selection of Leading and other Cases. By J. WELLS THATCHER and D. H. J. HARTLEY, Barristers-at-Law. *Demy* 8*vo.* 1909. *Price* 7*s.* 6*d. cloth.*

Wharton's Law Lexicon.—Forming an Epitome of the Law of England, and containing full explanations of the Technical Terms and Phrases thereof, both ancient and modern and commercial, with selected Titles from the Civil, Scots and Indian Law. *Eleventh Edition.* By W. HANBURY AGGS, Barrister-at-Law. *Super-royal* 8*vo.* 1910. *Price* 1*l.* 18*s. cloth.*

Farrer's Precedents of Conditions of Sale of Real Estate, Reversions, Policies, &c.; with exhaustive Footnotes, Introductory Chapters, and Appendices.—*Second Edition.* By FREDERICK EDWARD FARRER and THOMAS PAKENHAM LAW, Barristers-at-Law. *Royal* 8*vo.* 1909. *Price* 16*s. cloth.*

Hood and Challis' Conveyancing, Settled Land and Trustee Acts, and some other recent Acts affecting Conveyancing. With Commentaries. *Seventh Edition.* By PERCY F. WHEELER, assisted by J. I. STIRLING, Barristers-at-Law. *Royal* 8*vo.* 1909. *Price* 20*s. cloth.*

Palmer's Company Law.—A Practical Handbook for Lawyers and Business Men. With an Appendix containing the Companies (Consolidation) Act, 1908, and Rules. *Eighth Edition.* By Sir FRANCIS BEAUFORT PALMER, Bencher of the Inner Temple. *Royal* 8*vo.* 1910. *Price* 12*s.* 6*d. cloth.*

Palmer's Company Precedents.—For use in relation to Companies subject to the Companies Acts.

PART I.: GENERAL FORMS. *Tenth Edition.* By Sir FRANCIS BEAUFORT PALMER, Bencher of the Inner Temple, assisted by the Hon. C. MACNAGHTEN, K.C., and EDWARD MANSON, Barrister-at-Law. *Roy.* 8*vo.* 1910. *Price* 38*s. cloth.*

PART II.: WINDING-UP FORMS AND PRACTICE. *Tenth Edition.* By Sir FRANCIS BEAUFORT PALMER, Bencher of the Inner Temple. *Roy.* 8*vo.* 1910. *Price* 32*s. cl.*

PART III.: DEBENTURES AND DEBENTURE STOCK. *Tenth Edition.* By Sir FRANCIS BEAUFORT PALMER, Bencher of the Inner Temple. *Royal* 8*vo.* 1907. *Price* 25*s. cl.*

*** *A Catalogue of Modern Law Works, Reports, &c. post free,* 6*d.*

A 10255 B&C JOL

Magistrate's General Practice, 1910 (The).—By CHARLES MILNER ATKINSON, Stipendiary Magistrate for Leeds. *Demy* 8*vo.* 1910. *Price* 20*s. cloth.*

Annual Practice (The), 1910.—Edited by B. FOSSETT LOCK, Barrister-at-Law; CHARLES BURNEY, a Master of the Supreme Court; and F. A. STRINGER, of the Central Office. *Two Vols.* 8*vo. Price, net,* 25*s. cloth.*

*** *A Thin Paper Edition in One Vol., price, net,* 25*s., or on India Paper,* 3*s.* 6*d. extra.*

A, B, C (The) Guide to the Practice of the Supreme Court, 1910.—By F. R. P. STRINGER, of the Central Office. *Royal* 12*mo. Price, net,* 5*s. cloth.*

Annual County Courts Practice, 1910.—By His Honour JUDGE SMYLY, K.C., and W. J. BROOKS, Barrister-at-Law. *Two Vols. Demy* 8*vo. Price* 1*l.* 5*s. cloth.*

*** *A Thin Paper Edition in One Vol., price* 25*s., or on India Paper,* 3*s.* 6*d. extra.*

Annual Digest (The) for 1909.—By JOHN MEWS, Barrister-at-Law. *Royal* 8*vo. Price* 15*s. cloth.*

*** *This Digest is also issued quarterly, each part being cumulative. Price to Subscribers, for the four parts,* payable in advance, *net,* 17*s.*

"The practice of the law without Mews' Annual would be almost an impossibility."—*Law Times.*

Leake's Elementary Digest of the Law of Property in Land.—*Second Edition.* By A. E. RANDALL, Barrister-at-Law, Editor of "Leake on Contracts," &c. *Royal* 8*vo.* 1909. *Price* 20*s. cloth.*

Leake's Principles of the Law of Contracts.—*Fifth Edit.* By A. E. RANDALL, Barrister-at-Law. *Royal* 8*vo.* 1906. *Price* 1*l.* 12*s. cloth.*

Arnould on the Law of Marine Insurance and Average.—*Eighth Edition.* By EDWARD LOUIS DE HART and RALPH ILIFF SIMEY, Barristers-at-Law. *Two Vols. Royal* 8*vo.* 1909. *Price* 3*l.* 3*s. cloth.*

Chalmers' Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities.—*Seventh Edition.* By Sir M. D. CHALMERS, K.C.B., C.S.I., Draughtsman of the Bills of Exchange Acts. *Demy* 8*vo.* 1909. *Price* 20*s. cloth.*

Spencer's Agricultural Holdings Act, 1908, with the New Rules and Forms issued by the Board of Agriculture. *Fourth Edition,* Re-Issue. By AUBREY J. SPENCER, Barrister-at-Law. *Demy* 8*vo.* 1909. *Price* 6*s. cloth.*

Spencer's Small Holdings and Allotments Act, 1908, with Explanatory Notes.—Also Circular Letters and Rules and Regulations of the Board of Agriculture and Fisheries, and Treasury Minutes, and Forms for use under the Act. By A. J. SPENCER, Barrister-at-Law. *Demy* 8*vo.* 1909. *Price* 7*s.* 6*d. cloth.*

Macdonell's Law of Master and Servant.—By Sir JOHN MACDONELL, LL.D., C.B., a Master of the Supreme Court. *Second Edition.* By EDWARD A. MITCHELL INNES, K.C. *Royal* 8*vo.* 1908. *Price* 25*s. cloth.*

Ingpen on the Law of Executors.—A Concise Treatise on the Law relating to Executors and Administrators. By ARTHUR ROBERT INGPEN, K.C. *Royal* 8*vo.* 1908. *Price* 25*s. cloth.*

Macnamara's Law of Carriers of Merchandise and Passengers by Land.—By WALTER HENRY MACNAMARA, Barrister-at-Law, Registrar to the Railway Commission, a Master of the Supreme Court. *Second Edition.* By the AUTHOR and W. A. ROBERTSON, Barrister-at-Law. *Roy.* 8*vo.* 1908. *Price* 1*l.* 10*s. cloth.*

Disney's Law of Carriage by Railway.—*Second Edition.* By HENRY W. DISNEY, Barrister-at-Law. *Demy* 8*vo.* 1909. *Price* 7*s.* 6*d. cloth.*

Petrides' Students' Cases, illustrative of all branches of the Law.—By PHILIP B. PETRIDES, Barrister-at-Law. *Demy* 8*vo.* 1910. *Price* 10*s.* 6*d. cloth.*

Stringer's Oaths and Affirmations in England and Ireland.—*Third Edition.* By FRANCIS A. STRINGER, of the Central Office, Royal Courts of Justice, assisted by J. JOHNSTON, of the Royal Courts of Justice. *Crown* 8*vo.* 1910. *Price* 4*s. cloth.*

MIDDLE TEMPLE LIBRARY

RESTRICTIVE COVENANTS AFFECTING LAND.

BY

W. ARNOLD JOLLY, M.A.,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

Author of "Contracts in Restraint of Trade," and Editor of Seaborne's "Vendors and Purchasers," 4th, 5th, 6th and 7th editions.

LONDON:

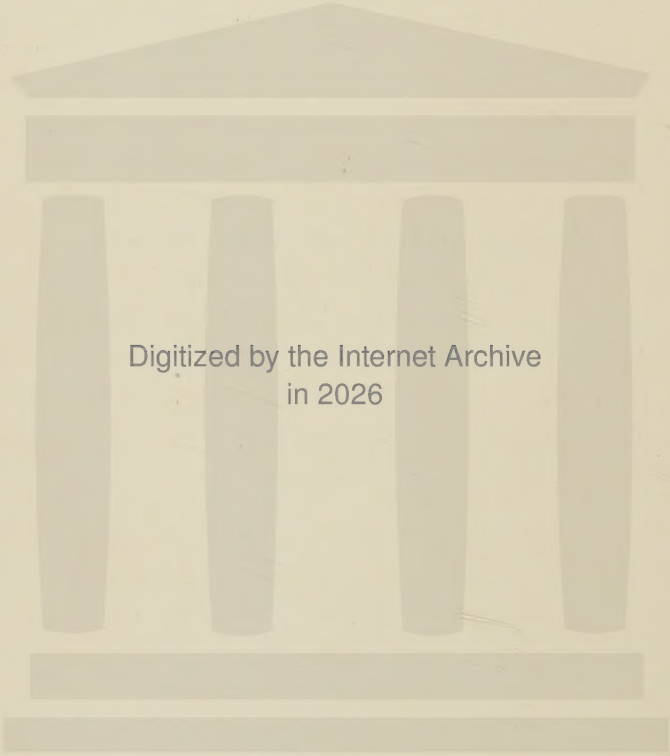
STEVENS AND SONS, LIMITED,

119 & 120, CHANCERY LANE,

Law Publishers.

1909.

KN 65.6 JOL


Digitized by the Internet Archive
in 2026

https://archive.org/details/restrictivecoven0000warn_v7j1

PREFACE.

In this treatise an attempt has been made not merely to furnish a compendium of the authorities relating to restrictive covenants, but to analyse the various decisions and to discover the underlying principles upon which they are founded. How far this attempt has been attended with success it must be left to others to decide, but the writer is fully impressed with the difficulty of the task and does not pretend to have solved, even to his own satisfaction, many of the problems which present themselves.

The equity lawyers of the earlier part of the last century, deeply imbued as they were with the "equitable doctrine of notice," seem in dealing with this subject to have paid more attention to the convenience of mankind than to the strict application of any settled principle. Recent decisions have done much to place this branch of the law on what may perhaps be described as a logical basis; but not only is there considerable difficulty in reconciling the modern doctrine as to the operation of a restrictive covenant and the nature of the burden thereby created with the reasoning and

dicta contained in the earlier decisions, but the law on this subject is not, even at the present time, in all respects logical or consistent.

It is, however, hoped that this work may be found of some small assistance in dealing with the numerous questions which arise in practice in connection with building schemes and restrictive covenants affecting land.

W. A. J.

8, Stone Buildings,
Lincoln's Inn.
January 9th, 1909.

TABLE OF CHAPTERS AND HEADINGS.

CHAPTER I.

PAGE

THE ORIGIN OF THE DOCTRINE IN TULK *v.* MOXHAY 1

Privity of Contract ..... 3—6
Privity of Estate ..... 6—8
The Decision in *Keppell* v. *Bailey* ..... 8—9

CHAPTER II.

THE NATURE OF THE EQUITABLE BURDEN CREATED BY A RESTRICTIVE COVENANT 10

The Decision in *Tulk* v. *Moxhay* ..... 10—11
The Restriction an equitable Burden on Land ..... 11—12
Alternative Theories as to the Nature of the Burden ..... 12—15
Analogy to an Easement ..... 15—17

CHAPTER III.

PERSONAL AND COLLATERAL COVENANTS 18

Covenants personal to the Covenantor ..... 18—20
Covenants personal to the Covenantee ..... 21—24

CHAPTER IV.

HOW THE EQUITABLE BURDEN MAY BE DEFEATED 25

The Plea of Purchaser for Value without Notice ..... 25—27
Constructive Notice affecting Lessees ..... 27—28
Constructive Notice affecting Purchasers of the Fee Simple ..... 28—32
Registered Titles ..... 32—35
Conveyances under the Lands Clauses Acts ..... 35—37
Ultra vires 37
Title Paramount ..... 37—38

CHAPTER V.

PAGE

ASSIGNMENT OF THE BENEFIT 39

Where no Property retained 40
Benefit not annexed to any particular Property ..... 40—43
When the Benefit is expressly annexed to particular Land..43—45
Can the Benefit be annexed to an Incorporeal Hereditament? ..... 45—46
Merger 46
Sub-sales..... 46—47

CHAPTER VI.

DEEDS OF MUTUAL COVENANT 48

Form of Deed of Mutual Covenant 49
Decision in *Whatman* v. *Gibson* ..... 49—51
Decision in *Schreiber* v. *Creed* ..... 51—52
Later Decisions ..... 52—53

CHAPTER VII.

MUTUAL COVENANTS IMPLIED IN THE CASE OF BUILDING SCHEMES 54

Scheme entered into by antecedent Sale ..... 54—56
General Scheme inferred from Particulars, Conditions, Plans, &c. ..... 56—58
Power to vary the Stipulations..... 58
Exhibition of a Plan 59
Succession Sales..... 59—62
Sub-schemes ..... 62—63

CHAPTER VIII.

RESTRICTIVE COVENANTS IN LEASES 64

Covenants by Lessors ..... 65—66
Covenants by Lessees ..... 66—67
Tied-House Covenants ..... 67—72
Proviso for Re-entry..... 72—73
Liability of Lessees for acts of Underlessees ..... 73—74
Liability of Underlessee ..... 74—76

CHAPTER IX.

PAGE
CONSTRUCTION OF RESTRICTIVE COVENANTS 77
Distinction between Erection and User.....77—79
Specific Expressions strictly construed .....79—80
Ejusdem Generis .....80—81
Implied Restriction .....81—82
Covenants as to Erections .....82—83
Building .....83—84
Covenants as to User.....84—87
Covenants as to Intoxicating Liquors .....87—88

CHAPTER X.

REMEDIES FOR ENFORCING RESTRICTIVE COVENANTS 89
Damages at Common Law .....89—91
Penalty Clause .....91—92
Damages where no Legal Privity .....92—93
Injunction .....93—95
Acquiescence .....95—98
Alteration in the Character of the Neighbourhood .....98—101
Breaches of Covenant by the Plaintiff..... 101

CHAPTER XI.

THE IMPORTANCE OF RESTRICTIVE COVENANTS IN CONNECTION WITH THE SALE OF LAND 102
Duty of the Vendor to disclose .....102—106
Compensation .....106—108
Form of Conveyance.....108—110
Covenants for Title .....110—112
Registered Land.....112—114

TABLE OF CASES.

PAGE

Aldin *v.* Latimer, Clark, Muirhead & Co., [1894] 2 Ch. 437; 63 L. J. Ch. 601; 71 L. T. 119; 42 W. R. 453 - - - 82
Aldred's Case (1611), 9 Rep. 58 b - - - - - 16
Alexander *v.* Mansions Proprietary, Limited (1900), 16 T. L. R. 451 - - - - - - - 60, 93
Allen & Sons, Ltd., In re, [1907] 1 Ch. 575; 76 L. J. Ch. 362; 96 L. T. 660; 14 Manson, 144 - - - - - 14
Altman *v.* Royal Aquarium Society (1876), 3 C. D. 231 - - 77
Ashby *v.* Wilson, [1900] 1 Ch. 66; 81 L. T. 480; 69 L. J. Ch. 47; 48 W. R. 105 - - - - - - - 20
Aspden *v.* Seddon (1876), 1 Ex. D. 496; 46 L. J. Ex. 353; 36 L. T. 45; 25 W. R. 277 - - - - - 15
Associated Portland Cement Manufacturers (1900) v. Tolhurst, [1902] 2 K. B. 668; [1903] A. C. at p. 420 - - 3, 4, 69
Att.-Gen. *v.* Biphosphated Guano Co. (1878), 11 C. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621 - - - 16
Att.-Gen. *v.* Hall (1853), 16 Beav. 392; 1 W. R. 117 - - 27
Att.-Gen. *v.* Payne (1859), 27 Beav. 174 - - - - 27
Att.-Gen. *v.* Richmond Corporation (1903), 89 L. T. 700; 20 T. L. R. 131 - - - - - - - 59
Att.-Gen. *v.* Wilkins (1853), 17 Beav. at p. 292; 22 L. J. Ch. 830; 17 Jur. 885; 1 W. R. 472 - - - - - 25
Austerberry *v.* Corporation of Oldham (1885), 29 C. D. 750; 55 L. J. Ch. 633; 53 L. T. 543; 33 W. R. 807 - - 12, 45

Bagot Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co., [1902] 1 Ch. 146, 155; 71 L. J. Ch. 158; 85 L. T. 652; 50 W. R. 177 - 3, 4
Bailey *v.* Stevens (1862), 12 C. B. N. S. 91; 31 L. J. C. P. 226; 6 L. T. 356; 8 Jur. N. S. 1063; 10 W. R. 868 - - - 17
Baily *v.* De Crespigny (1869), L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; 18 L. T. 681; 17 W. R. 494 - - - 73, 89
Baily *v.* Skinner (1898), 42 Sol. J. 780 - - - 20, 87

PAGE
Bally *v.* Wells (1769), 3 Wils. 25; Wilmot, 341 - - - 66
Barret *v.* Blagrave (1800), 5 Ves. 555; 6 Ves. 104 - 5, 97
Bedford (Duke of) *v.* Dawson (1875), 20 Eq. 353; 44 L. J. Ch. 549; 33 L. T. 156 - - - - - - 35
Bedford (Duke of) *v.* Trustees of British Museum (1822), 2 My. & K. 525; 2 L. J. Ch. 129 - - - - 98, 99
Bickford *v.* Parson (1848), 5 C. B. 920; 17 L. J. C. P. 192; 12 Jur. 377 - - - - - - - 69
Biggs *v.* Hoddinott, [1898] 2 Ch. 307; 67 L. J. Ch. 540; 79 L. T. 201; 47 W. R. 84 - - - - - 23
Bird *v.* Eggleton (1885), 29 C. D. 1012; 54 L. J. Ch. 819; 53 L. T. 87; 33 W. R. 774 - - - - - 36
Birmingham and District Land Co. and Allday, In re, [1893] 1 Ch. 342; 62 L. J. Ch. 90; 67 L. T. 850; 41 W. R. 189; 3 R. 84 - - - - - - - - 58
Birmingham Breweries, Ltd. *v.* Jameson (1898), 78 L. T. 712; 67 L. J. Ch. 403 - - - - - - - 69
Bonnett *v.* Sadler (1808), 14 Ves. 526 - - - - 85
Bowes *v.* Law (1870), L. R. 9 Eq. 636; 39 L. J. Ch. 483; 22 L. T. 267; 18 W. R. 640 - - - - - 83
Brewer and Hankin's Contract, In re (1889), 80 L. T. 127 - 107
Brewster *v.* Kidgill (1697), 1 Ld. Raym. 318; 1 Salk. 198; 2 Salk. 613; 3 Salk. 340; 5 Mod. 369; 12 Mod. 160, 171; Holt, 175, 669; Carth. 438; Comb. 424 - - - - - 45
Bramwell *v.* Lacy (1879), 10 C. D. 691; 48 L. J. Ch. 339; 40 L. T. 361; 27 W. R. 463 - - - - - 84, 86
Brigg *v.* Thornton, [1904] 1 Ch. 386; 73 L. J. Ch. 301; 90 L. T. 327; 52 W. R. 276 - - - - - 19, 20, 79
Bristow *v.* Wood (1844), 14 L. J. Ch. 50; 1 Coll. C. C. 480; 9 Jur. 99 - - - - - - - - 9, 104
Bryant *v.* Hancock & Co., [1898] 1 Q. B. 716; [1899] A. C. 442; 68 L. J. Q. B. 889; 81 L. T. 96 - - - - 74
Buckle *v.* Fredericks (1890), 44 C. D. 244; 62 L. T. 884; 38 W. R. 742 - - - - - - - - 87, 88
Bunny *v.* Hopkinson (1859), 27 Beav. 565; 29 L. J. Ch. 93; 6 Jur. N. S. 187; 1 L. T. 53 - - - - - 112

Cable *v.* Bryant, [1908] 2 Ch. 159 - - - - 82
Camberwell and South London Building Society *v.* Holloway (1879), 13 C. D. at p. 762; 49 L. J. Ch. 361; 41 L. T. 752; 28 W. R. 222 - - - - - - - 105
Campbell *v.* Lewis (1820), 3 B. & Ald. 392, at p. 396 - - 6

PAGE
Carter *v.* Williams (1870), L. R. 9 Eq. 678; 39 L. J. Ch. 580; 23 L. T. 183; 18 W. R. 593 - - - - - 28
Cato *v.* Thompson (1882), 9 Q. B. D. 616; 47 L. T. 491 - 33, 106, 108
Catt *v.* Tourle (1869), L. R. 4 Ch. 654; 38 L. J. Ch. 665; 21 L. T. 188; 17 W. R. 939 - - - - - 21, 22
Cave *v.* Cave (1880), 15 C. D. 639 - - - - 25
Child *v.* Douglas (1854), 5 D. M. & G. 739; 2 Jur. N. S. 950; Kay, 560; 2 W. R. 701 - - - - - 50, 55, 83
Childe and Hodgson's Contract, In re (1906), 54 W. R. 234 - 106
Clark *v.* School Board for London (1874), L. R. 9 Ch. 120; 43 L. J. Ch. 421; 29 L. T. 903; 22 W. R. 354 - - - 35
Cleaver *v.* Bacon (1887), 4 T. L. R. 27 - - - - 85
Clegg *v.* Hands (1890), 44 C. D. 503, at p. 519; 59 L. J. Ch. 477; 62 L. T. 502; 38 W. R. 433 - - - 10, 12, 39, 70
Clements *v.* Welles (1865), L. R. 1 Eq. 200; 35 L. J. Ch. 265; 13 L. T. 548; 14 W. R. 187 - - - - - 27
Coles *v.* Sims (1853), Kay, 56; affirmed, 5 D. M. & G. 1; 2 Eq. Rep. 951; 23 L. J. Ch. 258; 18 Jur. 683; 2 W. R. 151 - 9, 27, 52, 92
Collins *v.* Archer (1830), 1 R. & M. 284 - - - - 35
Collins *v.* Castle (1887), 36 C. D. 243; 57 L. J. Ch. 76; 57 L. T. 764; 36 W. R. 300 - - - - - 57, 60, 61
Collins *v.* Plumb (1810), 16 Ves. 457; 10 R. R. 214 - - 7
Colyear *v.* Lady Mulgrave (1836), 2 Keen, 81; 5 L. J. Ch. 335 - 4
Congleton (Mayor of) *v.* Pattison (1808), 10 East, 130 - 66, 67
Cooke *v.* Chilcott (1876), 3 C. D. 694; 24 L. T. 207 - - 7
Cooke *v.* Gilbert (1892), 8 T. L. R. 382 - - - - 94
Coombs *v.* Cook (1883), 1 Cab. & E. 75 - - - - 81
Cooper *v.* Emery (1844), 1 Ph. 388; 13 L. J. Ch. 275; 8 Jur. 181 - 31
Cosser *v.* Collinge (1832), 3 M. & K. 283; 1 L. J. Ch. 130 - 103
Cox and Neve's Contract, In re, [1891] 2 Ch. 109; 64 L. T. 733; 39 W. R. 412 - - - - - 31, 105, 107
Cox *v.* Bishop (1857), 8 D. M. & G. 815; 26 L. J. Ch. 389; 3 Jur. N. S. 499; 3 W. R. 437 - - - - - - 5
Cox *v.* Coventon (1862), 31 Beav. 378; 8 Jur. N. S. 1142; 7 L. T. 78; 10 W. R. 829 - - - - - 105
Craig *v.* Greer, [1899] 1 Ir. R. 259 - - - 46, 94, 99
Cullen and Riall's Contract, In re, [1904] 1 Ir. R. 206 - - 88

David *v.* Sabin, [1893] 1 Ch. 523; 62 L. J. Ch. 347; 68 L. T. 237; 41 W. R. 398 - - - - - - - 6
Davis and Carey, In re (1888), 40 C. D. 601 - - 103, 105
Davis *v.* Corpn. of Leicester, [1894] 2 Ch. 208; 63 L. J. Ch. 440; 70 L. T. 599; 42 W. R. 610; 7 R. 609 - - - 37, 57

PAGE
Davis *v.* Town Properties Investment Corpn., Ltd., [1903] 1 Ch. 797; 72 L. J. Ch. 389; 88 L. T. 665; 51 W. R. 417 - 65, 111
De Mattos *v.* Gibson (1858), 4 De G. & J. 276; 28 L. J. Ch. 598; 5 Jur. N. S. 555; 7 W. R. 514 - - - - - 9, 13
Dennett *v.* Atherton (1872), L. R. 7 Q. B. 316, at p. 326; 41 L. J. Q. B. 165; 20 W. R. 442 - - - - 1, 75, 110
Devonshire (Duke of) *v.* Brookshaw (1899), 81 L. T. 83 - 44, 85, 97
Devonshire (Duke of) *v.* Simmons (1894), 11 T. L. R. 52 - - 88
Dewar *v.* Goodman, [1908] 1 K. B. 104 - - - 65, 66
Doe *v.* Allen (1810), 3 Taunt. 78 - - - - - 90
Doe *v.* Bird (1834), 2 A. & E. 161; 4 L. J. K. B. 52 - - 86
Doe *v.* Keeling (1813), 1 M. & S. 95 - - - - 84
Doe *v.* Peek (1830), 1 B. & Ad. at p. 428; 9 L. J. (O. S.) K. B. 60- 73
Doe d. Calvert *v.* Reid (1830), 10 B. & C. 849; 8 L. J. (O. S.) K. B. 328 - - - - - - - 68
Doe *v.* Woodhouse (1829), 9 B. & C. 376 - - - - 90
Doherty *v.* Allmann (1878), 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513 - - - - - - 21, 40, 94
Dougherty *v.* Oates (1900), 45 Sol. J. 119 - - - 106
Dover (Warden of) *v.* South Eastern Rail. Co. (1852), 9 Hare, 489; 21 L. J. Ch. 886 - - - - - - 77

Eagle *v.* Charing Cross Rail. Co. (1867), L. R. 2 C. P. 638; 36 L. J. C. P. 297; 16 L. T. 593; 15 W. R. 1016 - - 34, 36
Eastwood *v.* Lever (1863), 4 D. J. & S. 114; 33 L. J. Ch. 355; 9 L. T. 615; 12 W. R. 195; 3 W. R. 232 - 13, 49, 55, 93, 96, 97
Ebsworth and Tidy's Contract, In re (1889), 42 C. D. 23; 58 L. J. Ch. 665; 60 L. T. 841; 37 W. R. 657; 54 J. P. 199 - 107
Elliman *v.* Carrington, [1901] 2 Ch. 275; 70 L. J. Ch. 577; 84 L. T. 858; 49 W. R. 532 - - - - - 15
Ellis *v.* Rogers (1884), 29 C. D. 661; 53 L. T. 377 - 33, 36, 37, 106
Elliston *v.* Reacher, [1908] 2 Ch. 393 - 47, 52, 53, 58, 63, 94
Elves *v.* Crofts (1850), 10 C. B. 241 - - - - 99
Ernest *v.* Vivian (1863), 33 L. J. Ch. 513 - - - - 25
Evans *v.* Davis (1878), 10 C. D. 747; 48 L. J. Ch. 223; 39 L. T. 391; 27 W. R. 285 - - - - - 74, 93
Everett *v.* Remington, [1892] 3 Ch. 148; 61 L. J. Ch. 574; 67 L. T. 80 - - - - - - 42, 43

Fairclough *v.* Marshall (1878), 4 Ex. D. 37; 39 L. T. 389; 27 W. R. 145 - - - - - - 12, 45
Fawcett and Holmes, In re (1889), 42 C. D. 150; 58 L. J. Ch. 763; 61 L. T. 105 - - - - - - 19, 107

PAGE
Feilden *v.* Slater (1869), L. R. 7 Eq. 523; 38 L. J. Ch. 379; 20 L. T. 112; 17 W. R. 485 - - - - 19, 87
Fitz *v.* Iles, [1893] 1 Ch. 77; 62 L. J. Ch. 258; 68 L. T. 108; 2 R. 132 - - - - - - 20, 87
Fitzroy *v.* Cave, [1905] 2 K. B. 372 - - - - 4
Fleetwood *v.* Hull (1889), 23 Q. B. D. 35; 58 L. J. Q. B. 341; 60 L. T. 790; 37 W. R. 714 - - - - - 67
Flight *v.* Barton (1832), 3 My. & K. 282 - - - - 103
Flight *v.* Bentley (1835), 7 Sim. 149; 4 L. J. Ch. 262 - - 5
Flight *v.* Booth (1834), 1 Bing. N. C. 370; 1 Scott, 190; 4 L. J. C. P. 66 - - - - - - 102, 107
Flinn *v.* Pountain (1889), 58 L. J. Ch. 389; 60 L. T. 484; 27 W. R. 443 - - - - - - - 14
Formby *v.* Barker, [1903] 2 Ch. 539; 72 L. J. Ch. 716; 89 L. T. 249; 51 W. R. 646 - - 15, 19, 21, 22, 40, 64, 81, 94
Foster *v.* Fraser, [1893] 3 Ch. 158; 63 L. J. Ch. 91; 69 L. T. 136; 32 W. R. 11; 3 R. 635 - - - - - - 83

Gainsborough (Earl of) *v.* Watcombe Terra Cotta Clay Co. (1885), 53 L. T. 116; 54 L. J. Ch. 991 - - - - - 30
Gale *v.* Squier (1876), 4 C. D. 226; 5 C. D. 625; 46 L. J. Ch. 572; 36 L. T. 632; 25 W. R. 226 - - - - - 113
Gaskin *v.* Balls (1879), 13 C. D. 324; 28 W. R. 552 - 52, 89, 95
Gedge *v.* Bartlett (1900), 17 T. L. R. 43 - - - - 60
German *v.* Chapman (1877), 7 C. D. 271; 47 L. J. Ch. 250; 37 L. T. 685; 26 W. R. 149 - - - 77, 80, 85, 98, 101
Gibson *v.* Doeg (1857), 2 H. & N. 615; 27 L. J. Ex. 37; 6 W. R. 107 - - - - - - - - 91
Gloag and Miller's Contract, In re (1883), 23 C. D. 320; 52 L. J. Ch. 654; 48 L. T. 629; 31 W. R. 601 - - - 107
Great Northern Rail. Co. *v.* Inland Revenue, [1901] 1 Q. B. 416; 68 L. J. Q. B. 978; 81 L. T. 385; 48 W. R. 170; 64 J. P. 21 - 17
Great Western Railway *v.* Fisher, [1905] 1 Ch. 322; 71 L. J. Ch. 241; 92 L. T. 104; 53 W. R. 279 - - 110, 112, 113
Gregory *v.* Williams (1817), 3 Mer. 582 - - - - 4
Griffin *v.* Tomkin (1880), 42 L. T. 359 - - - - 90
Grosvenor *v.* Green (1859), 28 L. J. Ch. 173 - - - 103
Gutteridge *v.* Munyard (1834), 7 C. & P. 129; 1 M. & Rob. 334 - 85

Haedicke and Lipski's Contract, In re, [1901] 2 Ch. 666; 70 L. J. Ch. 811; 85 L. T. 402; 50 W. R. 20 - - - 104

PAGE

Hall *v.* Ewin (1887), 37 C. D. 74; 57 L. J. Ch. 95; 57 L. T. 831; 36 W. R. 84 - - - - 10, 12, 74, 75, 86, 93

Hanbury *v.* Cundy (1887), 58 L. T. 155 - - - - - 92

Hardman *v.* Child (1885), 28 C. D. 712 - - - - 109

Harman *v.* Ainslie, [1904] 1 K. B. 689; 2 K. B. 241; 73 L. J. K. B. 539; 90 L. T. 624; 52 W. R. 615; 20 T. L. R. 356 - 72

Harris *v.* Boots Cash Chemists, [1904] 2 Ch. 376; 73 L. J. Ch. 708; 52 W. R. 668; 20 T. L. R. 625 - - - - 109

Harrison *v.* Good (1871), L. R. 11 Eq. 338; 40 L. J. Ch. 294; 24 L. T. 263; 19 W. R. 346 - - - - - 86

Hartley *v.* Pehall, 1 Peake, 178 - - - - - 102

Hawes *v.* Scott (1896), 40 Sol. J. 373 - - - - 81

Haywood *v.* Brunswick Permanent Benefit Building Society (1881), 8 Q. B. D. 403; 51 L. J. Q. B. 73; 43 L. T. 699; 30 W. R. 299 - - - - - 9, 12, 15, 45

Heathcote *v.* N. Staffs Rail. Co. (1850), 2 Mac. & G. 100; 1 H. & T. 382; 6 Railw. Cas. 358; 14 Jur. 859 - - - 13

Hepworth *v.* Pickles, [1900] 1 Ch. 108; 69 L. J. Ch. 55; 81 L. T. 818; 48 W. R. 184 - - - - - - 91

Heriot's Hospital (Feoffees of) *v.* Gibson (1814), 2 Dow, 301 - 59

Hewlins *v.* Shippam, 5 B. & C. 229 - - - - 34

Higgins and Hitchman's Contract, In re (1882), 21 C. D. 95; 51 L. J. Ch. 772; 30 W. R. 700 - - - - - 37

Hill *v.* Tupper (1863), 2 H. & C. 121; 32 L. J. Ex. 217; 9 Jur. N. S. 725; 8 L. T. 792; 11 W. R. 784 - - - - 17

Hinde *v.* Gray (1840), 1 Man. & G. 195; 1 Scott (N. R.), 123; 9 L. J. C. P. 253; 4 Jur. 392 - - - - - 65

Hobson *v.* Gorringe, [1897] 1 Ch. at p. 192 - - - 14

Hobson *v.* Tullock, [1898] 1 Ch. 424; 67 L. J. Ch. 205; 78 L. T. 224; 46 W. R. 331 - - - - - - 85

Holford *v.* Acton U. D. C., [1898] 2 Ch. 240; 67 L. J. Ch. 636; 78 L. T. 829 - - - - - - 77, 78

Holliwell *v.* Seacombe, [1906] 1 Ch. at p. 434 - - 37, 107

Holloway Bros. *v.* Hill, [1902] 2 Ch. 612; 87 L. T. 201; 71 L. J. Ch. 218 - - - - - - 19, 20, 28

Holmes *v.* Buckley (1691), 1 Eq. Ca. Abr. 27; Prec. in Ch. 39 - 7

Hooper *v.* Bromet (1903), 89 L. T. 37; (1904), 90 L. T. 234 - 32, 52, 58, 101

Horsey Estate, Ltd. *v.* Steiger, [1899] 2 Q. B. 79; 68 L. J. Q. B. 743; 80 L. T. 857; 47 W. R. 644 - - - 20, 73

Hudson *v.* Cripps, [1896] 1 Ch. 265; 65 L. J. Ch. 328; 73 L. T. 741; 44 W. R. 200 - - - - - 57, 60

Hyde *v.* Warden (1877), 3 Ex. D. 72; 47 L. J. Ex. 121; 37 L. T. 567; 26 W. R. 201 - - - - - - 103

PAGE
Ilford Park Estates, Ltd. *v.* Jacobs, [1903] 2 Ch. 522; 72 L. J. Ch. 699; 89 L. T. 295 - - - - - - 82
Imray *v.* Oakshette, [1897] 2 Q. B. 218; 66 L. J. Q. B. 544; 76 L. T. 632; 45 W. R. 681 - - - - - 31
Ind, Coope & Co. *v.* Hamblin (1900), 84 L. T. 168 - - 80

Jackson *v.* Winnifrith (1882), 47 L. T. 243 - - 98, 101
Jaeger *v.* Mansions Consolidated, Ltd. (1903), 87 L. T. 690; 19 T. L. R. 114 - - - - - - - 60
Jay *v.* Richardson (1862), 30 Beav. 563; 31 L. J. Ch. 398; 6 L. T. 177; 10 W. R. 412; 8 Jur. N. S. 689 - - - 20, 80
Jenkins *v.* Jackson (1888), 40 C. D. 71; 58 L. J. Ch. 124; 60 L. T. 105; 37 W. R. 253 - - - - - - 82
John Brothers Abergarw Brewery Co. *v.* Holmes, [1900] 1 Ch. 188; 69 L. J. Ch. 149; 81 L. T. 771; 48 W. R. 236 - 24, 38
Johnstone *v.* Hall (1856), 2 K. & J. 414; 25 L. J. Ch. 462; 2 Jur. N. S. 780; 4 W. R. 417 - - - - - 85
Jones *v.* Bone (1870), L. R. 9 Eq. 674; 39 L. J. Ch. 405; 23 L. T. 304; 18 W. R. 489 - - - - - 88, 92
Jones *v.* Edney (1812), 3 Camp. 285 - - - - 102
Jones *v.* Heavens (1877), 4 C. D. 636; 25 W. R. 460 - - 65
Jones *v.* Lavington, [1903] 1 K. B. 203; 72 L. J. K. B. 98; 88 L. T. 223; 51 W. R. 161 - - - - 28, 75, 110
Jones *v.* Rimmer (1888), 14 C. D. 588; 49 L. J. Ch. 775; 43 L. T. 111; 29 W. R. 165 - - - - - 106
Jones *v.* Thorne (1823), 1 B. & C. 715; 3 D. & R. 152; 1 L. J. (O. S.) K. B. 200 - - - - - 85, 86

Keates *v.* Lyon (1869), L. R. 4 Ch. 218, at p. 225; 20 L. T. 255; 38 L. J. Ch. 357; 17 W. R. 338 - 9, 39, 40, 46, 57, 91
Kelly *v.* Rogers, [1892] 1 Q. B. 910; 61 L. J. Q. B. 604; 66 L. T. 582; 40 W. R. 516; 56 J. P. 789 - - - - 75
Kelsey *v.* Dodd (1881), 52 L. J. Ch. 34 - - 42, 53, 92, 96
Kemble *v.* Farren (1829), 6 Bing. 141 - - - - 91
Kemp *v.* Baerselman, [1906] 2 K. B. 604; 75 L. J. K. B. 873 - 69
Kemp *v.* Bird (1877), 5 C. D. 974; 46 L. J. Ch. 828; 37 L. T. 53; 25 W. R. 838 - - - - - - 20
Kemp *v.* Sober (1851), 1 Sim. N. S. 517; 20 L. J. Ch. 602; 15 Jur. 458 - - - - - - 84, 95, 99
Keppell *v.* Bailey (1834), 2 My. & K. 517, at p. 539; Coop. t. Brougham, 278 - - - - - 2, 8, 11, 17, 68
Kilbey *v.* Haviland (1871), 24 L. T. 353; 19 W. R. 698 - 52, 92, 96

PAGE
Kimber *v.* Admans, [1900] 1 Ch. 412; 69 L. J. Ch. 296; 82 L. T. 136; 48 W. R. 322 - - - - - 78, 81, 82
King *v.* Dickeson (1889), 40 C. D. 596; 58 L. J. Ch. 464; 60 L. T. 785; 37 W. R. 553 - - - - 46, 109
Kirby *v.* School Board for Harrogate, [1896] 1 Ch. 437; 65 L. J. Ch. 376; 74 L. T. 6 - - - - 33, 36
Knight *v.* Simmonds, [1896] 1 Ch. 653; 2 Ch. 294; 65 L. J. Ch. 583; 74 L. T. 563; 44 W. R. 580 - - - 63, 85, 99

Leader *v.* Moody (1875), L. R. 20 Eq. 145; 32 L. T. 422 - 56, 82
Leech *v.* Schweder (1874), L. R. 9 Ch. 475; 43 L. J. Ch. 487; 30 L. T. 586; 22 W. R. 633 - - - - - 17
Leeds (Duke of) *v.* Amherst (1846), 2 Ph. 117; 10 Jur. 956 - 95
Lon. C. & D. Rail. Co. *v.* Bull (1882), 47 L. T. 413 - - 96
Lon. & N. W. Rail. Co. *v.* Garnett (1869), L. R. 9 Eq. 26; 39 L. J. Ch. 25; 21 L. T. 352; 18 W. R. 246 - - - 88
Lon. & S. W. Rail. Co. *v.* Gomm (1882), 20 C. D. 562, at p. 583; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620 - - 8, 15, 26
Lon. & Suburban Land and Building Co. *v.* Field (1881), 16 C. D. 645; 50 L. J. Ch. 549; 44 L. T. 444 - - - 52, 88
Long Eaton Recreation Grounds Co. *v.* Midland Rail. Co., [1902] 2 K. B. 574; 71 L. J. K. B. 837; 86 L. T. 873; 50 W. R. 693 - 34, 37, 83, 86
Lucas *v.* Comerford (1790), 3 Bro. C. C. 166; 1 Ves. Jr. 235 - 5
Luker *v.* Dennis (1877), 7 C. D. 227; 47 L. J. Ch. 174; 37 L. T. 827; 26 W. R. 167 - - - - - 24, 72
Lukey *v.* Higgs (1855), 1 Jur. N. S. 200; 24 L. J. Ch. 495; 3 W. R. 306; 3 Eq. R. 510 - - - - 29, 108
Lumley *v.* Metropolitan Rail. Co. (1876), 34 L. T. 774 - - 87
Lumley *v.* Wagner (1852), 1 D. M. & G. 604; 21 L. J. Ch. 898; 16 Jur. 871 - - - - - - 6, 14

McGruther *v.* Pitcher, [1904] 2 Ch. 306; 73 L. J. Ch. 653; 53 W. R. 138; 20 T. L. R. 652 - - - - - 15
Mackenzie *v.* Childers (1889), 43 C. D. 265; 59 L. J. Ch. 188; 62 L. T. 98; 38 W. R. 243 - - - - 52, 58
McLean *v.* McKay (1873), L. R. 5 C. P. 327; 29 L. T. 352; 21 W. R. 798 - - - - - - - 43
Manchester Brewery Co. *v.* Coombs, [1901] 2 Ch. 608; 70 L. J. Ch. 814; 82 L. T. 347 - - - - - 69, 71
Manchester Ship Canal *v.* Manchester Racecourse Co., [1901] 2 Ch. 37; 70 L. J. Ch. 468; 84 L. T. 436; 49 W. R. 418 - 14

PAGE
Mander *v.* Falcke, [1891] 2 Ch. 554; 65 L. T. 203 - - 26
Mann *v.* Stephens (1846), 15 Sim. 377; 10 Jur. 650 - 8, 43
Manners (Lord) *v.* Johnson (1875), 1 C. D. 673; 45 L. J. Ch. 404; 24 W. R. 481 - - - - - 42, 84, 95
March and Lord Granville's Contract, In re (1882), 24 C. D. at p. 15; 52 L. J. Ch. 189; 48 L. T. 947; 31 W. R. 845 - - 106
Martin *v.* Cotter (1846), 3 Jo. & Lat. 496; 1 Ir. Eq. R. 351 - 103
Martin *v.* Nutkin (1724), 2 P. Wms. 265 - - - - 1
Master *v.* Hansard (1876), 4 C. D. 718; 46 L. J. Ch. 505; 36 L. T. 535; 25 W. R. 370 - - - - - 42
May *v.* Belville, [1905] 2 Ch. 605; 74 L. J. Ch. 678; 93 L. T. 241; 54 W. R. 12 - - - - - 16
Mercer and Moore, In re (1880), 14 C. D. 287; 49 L. J. Ch. 201; 42 L. T. 311; 28 W. R. 485 - - - - 13
Meredith *v.* Wilson (1893), 69 L. T. 336 - - - - 97
Middlemore *v.* Goodale (1638), Cro. Car. 503; W. Jo. 406 - 6
Milnes *v.* Brench (1816), 5 M. & S. 411 - - - - 45
Molyneux *v.* Hawtrey, [1903] 1 K. B. 487, 72 L. J. K. B. 873; 89 L. J. 350; 52 W. R. 23 - - - - - 104
Monckton and Gilzeen, In re (1884), 27 C. D. 555 - - 109
Mordy and Cowman, In re (1884), 51 L. T. 721 - - - 58
Morish *v.* Harris (1865), L. R. 1 C. P. 155 - - - 83
Morland *v.* Cook (1868), L. R. 6 Eq. 252; 18 L. T. 496; 37 L. J. Ch. 825; 16 W. R. 777 - - - - - 7, 15, 29
Moxhay *v.* Inderwick (1847), 1 De G. & Sm. 708, at p. 712 - 9, 28, 108
Muller *v.* Trafford, [1901] 1 Ch. 61 - - - - - 1
Mumford *v.* Walker (1901), 71 L. J. K. B. 19; 85 L. T. 718 - 74

Nalder & Collyer's Brewery Co. *v.* Harman (1900), 82 L. T. 594; 83 L. T. 257 - - - - - - - 42
Nicoll *v.* Fenning (1881), 19 C. D. 258; 51 L. J. Ch. 166; 45 L. T. 738; 30 W. R. 95 - - - - - 44, 80, 93
Nisbet and Potts' Contract, In re, [1905] 1 Ch. 391; [1906] 1 Ch. 386; 75 L. J. Ch. 238; 54 W. R. 286 - 12, 16, 26, 32, 38, 107
Noakes & Co., Ltd. *v.* Rice, [1902] A. C. 24; 71 L. J. Ch. 159; 86 L. T. 62; 50 W. R. 305; [1900] 1 Ch. 219 - - 23, 24, 72
Northumberland (Duke of) *v.* Bowman (1887), 56 L. T. 773 - 96
Norval *v.* Pascoe (1864), 10 Jur. N. S. 792; 34 L. J. Ch. 82; 10 L. T. 809; 12 W. R. 973; 4 W. R. 390 - - - 6
Nottingham Patent Brick and Tile Co. *v.* Butler (1886), 16 Q. B. D. 778; 55 L. J. Q. B. 289; 54 L. T. 444; 34 W. R. 405 - 27, 30, 54, 57, 105, 107

PAGE

Onward Building Society *v.* Smithson, [1893] 1 Ch. 1; 62 L. J. Ch. 138; 68 L. T. 125; 2 R. 106; 41 W. R. 53 - - - 44
Osborne *v.* Bradley, [1903] 2 Ch. 446; 73 L. J. Ch. 49; 89 L. T. 11 - - - 21, 57, 58, 59, 60, 94, 96, 98, 99, 101

Palethorpe *v.* Home Brewery Co., Ltd., [1906] 2 K. B. 5; 75 L. J. K. B. 555; 94 L. T. 871; 54 W. R. 489 - - - 74
Parker *v.* Whyte (1863), 1 H. & M. 167; 32 L. J. Ch. 520; 8 L. T. 446; 11 W. R. 683 - - - - - 27, 95
Patching *v.* Dubbins (1853), Kay, 1; 23 L. J. Ch. 45; 2 Eq. R. 71 - - - - - - - 80, 100
Patman *v.* Harland (1881), 17 C. D. 353; 50 L. J. Ch. 642; 44 L. T. 728; 29 W. R. 707 - - - - 28, 32, 85
Peacock *v.* Penson (1848), 11 Beav. 355; 18 L. J. Ch. 57; 14 Jur. 318 - - - - - - - - 59
Pearse *v.* Coats (1866), L. R. 2 Eq. 688; 36 L. J. Ch. 57; 14 L. T. 886; 14 W. R. 1021; 12 Jur. N. S. 684 - - - 88
Peek v. Gurney (1873), L. R. 6 H. L. at p. 403; 43 L. J. Ch. 19; 22 W. R. 29 - - - - - - - 106
Peek *v.* Matthews (1867), L. R. 3 Eq. 515; 16 L. T. 199; 15 W. R. 689 - - - - - - - 49, 100
Peto *v.* Hammond (1861), 30 Beav. 495 - - - - 30
Phillips *v.* Caldcleugh (1868), L. R. 4 Q. B. 159; 20 L. T. 80; 38 L. J. Q. B. 68; 17 W. R. 575 - - - - 29, 104, 107
Phillips *v.* Phillips (1861), 4 D. F. & J. 208, at p. 215; 31 L. J. Ch. 321; 8 Jur. N. S. 145; 5 L. T. 655; 10 W. R. 236; 3 Giff. 200 - - - - - - - - 25
Piggott *v.* Stratton (1859), 1 D. F. & J. 33; 29 L. J. Ch. 1; 1 L. T. 111; 6 Jur. N. S. 129; 8 W. R. 13 - - - - 56
Plymouth (Mayor of) *v.* Martin (1884), 1 T. L. R. 5 - - 100
Pocock *v.* Gilham (1883), 1 Cab. & E. 104 - - - 83
Pollock *v.* Rabbits (1882), 21 C. D. 466; 47 L. T. 637; 31 W. R. 150 - - - - - - - - 89
Poole and Clarke's Contract, In re, [1904] 2 Ch. 173; 73 L. J. Ch. 612; 91 L. T. 275; 53 W. R. 122; 20 T. L. R. 604 - 29, 109
Pope *v.* Garland (1841), 4 Y. & C. Ex. 394 - - - 103
Potter *v.* Sanders (1846), 6 Hare, 1 - - - - 13
Princep *v.* Belgravian Estate, Ltd., W. N. (1896) 39 - - 16
Purfrey's Case (1587), Moore, 243; Godbolt, 120 - - - 67
Pye *v.* British Automobile Commercial Syndicate, [1906] 1 K. B. 425; 75 L. J. K. B. 270 - - - - - 92

PAGE
Ralph *v.* Crouch (1869), L. R. 3 Ex. 44 - - - - 112
Ramsden *v.* Hurst (1858), 4 Jur. N. S. 200; 27 L. J. Ch. 482; 6 W. R. 349 - - - - - - 108
Ranken *v.* Hunt (1894), 10 R. 249; 38 Sol. J. 290 - - 88
Rapley *v.* Smart (1893), 10 T. L. R. 174; W. N. (1894) 2 - 85
Reece *v.* Berridge (1888), 20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836; 36 W. R. 517; 52 J. P. 549 - - - 103
Reeves *v.* Cattell (1876), 24 W. R. 485 - - - - 85
Renals *v.* Cowlishaw (1879), 9 C. D. 129; 11 C. D. 866; 46 L. J. Ch. 830; 41 L. T. 116; 28 W. R. 9 - - 12, 41, 48, 49
Reynolds *v.* Budge (1856), 26 L. J. Q. B. 17 - - - 92
Richards *v.* Revett (1877), 7 C. D. 224; 47 L. J. Ch. 472; 37 L. T. 632; 26 W. R. 166 - - - - - - 94
Richardson *v.* Murphy, [1899] 1 Ir. R. 248 - - - 88
Roberts *v.* Heaton (1898), 42 Sol. J. 715 - - - - 69
Robson *v.* Flight (1865), 4 D. J. & S. 608; 34 L. J. Ch. 226; 11 L. T. 725; 13 W. R. 393; 11 Jur. N. S. 147 - - - 28
Rogers *v.* Hosegood, [1900] 2 Ch. 388, at p. 395; 83 L. T. 186; 69 L. J. Ch. 652; 48 W. R. 659 - 7, 12, 19, 39, 41, 44, 48, 77
Rolls *v.* Miller (1884), 27 C. D. 71; 53 L. J. Ch. 682; 50 L. T. 597; 32 W. R. 806 - - - - - - 84
Roper *v.* Williams (1822), T. & R. 18 - - - 97, 99
Rowell *v.* Satchell, [1903] 2 Ch. 212; 73 L. J. Ch. 20; 89 L. T. 267 - - - - - - 27, 59, 62, 63
Rudd *v.* Lascelles, [1900] 1 Ch. 815; 69 L. J. Ch. 396; 82 L. T. 256; 48 W. R. 586 - - - - - 107, 108
Russell *v.* Baber (1870), 18 W. R. 1021 - - - - 85
Russell *v.* Watts (1883), 23 C. D. 559; 50 L. T. 672; 32 W. R. 626; affirmed (1883), 10 App. Cas. 590 - - - - 46

St. Albans (Bishop of) *v.* Battersby (1878), 3 Q. B. D. 359; 47 L. J. Q. B. 571; 38 L. T. 685; 26 W. R. 678 - - - 88
Sampson *v.* Easterby (1829), 9 B. & C. 505; 3 M. & Ry. 422; affirming 6 Bing. 644; 4 M. & P. 601; 1 C. & J. 105 - - 66
Samuel Allen & Sons, Ltd., In re, [1907] 1 Ch. 575; 76 L. J. Ch. 362; 96 L. T. 660; 14 Manson, 144 - - - - 14
Sanderson *v.* Mayor of Berwick (1884), 13 Q. B. D. at p. 551 - 111
Sayers *v.* Collyer (1884), 28 C. D. 103; 54 L. J. Ch. 1; 51 L. T. 723; 33 W. R. 91 - - - - - 93, 96, 99
Schreiber *v.* Creed (1839), 10 Sim. 9; 8 L. J. Ch. 349; 3 Jur. 625 - - - - - - 46, 49, 51, 52
Sheppard *v.* Gilmore (1887), 57 L. J. Ch. 6; 57 L. T. 614 - 55
Sidney *v.* Clarkson (1865), 35 Beav. 118; 13 L. T. 659 - - 58

PAGE

Simpson *v.* Mayor of Godmanchester, [1896] 1 Ch. at p. 219; 66 L. J. Ch. 770; [1897] A. C. 696; 77 L. T. 409 - - - 16
Snow *v.* Whitehead (1884), 51 L. T. 253; 53 L. J. Ch. 885 77, 83
South Eastern Railway and Wiffen's Contract, [1907] 2 Ch. 366; 76 L. J. Ch. 481; 97 L. T. 576 - - - - - 37
South of England Dairies *v.* Baker, [1906] 2 Ch. 631 - - 74
Spencer *v.* Bailey (1893), 69 L. T. 179 - - - - 43
Spencer *v.* Marriott (1823), 1 B. & C. 456; 2 D. & R. 665; 1 L. J. (O. S.) K. B. 134; 25 R. R. 453 - - - - 75
Spicer *v.* Martin (1888), 14 A. C. 12; 60 L. T. 546; 58 L. J. Ch. 309; 37 W. R. 689 - - - - - - 42
Spurling *v.* Bantoft, [1891] 2 Q. B. at p. 393 - - 76, 111
Squire *v.* Campbell (1836), 1 M. & C. 459; 6 L. J. Ch. 41 - 59
Stevens *v.* Copp (1868), L. R. 4 Ex. 20; 38 L. J. Ex. 31; 19 L. T. 454; 17 W. R. 166 - - - - - - 73
Stevens *v.* Gourley (1859), 7 C. B. N. S. 99; 1 F. & F. 498; 27 L. J. C. P. 1; 6 Jur. N. S. 147; 1 L. T. 33; 8 W. R. 85 - 83
Stuart *v.* Diplock (1889), 43 C. D. 343; 59 L. J. Ch. 142; 62 L. T. 333; 38 W. R. 223 - - - - 20, 87
Stuart *v.* Joy, [1904] 1 K. B. 362; 73 L. J. K. B. 97; 90 L. T. 78; 20 T. L. R. 109 - - - - - - 64
Sturges *v.* Bridgman (1879), 11 C. D. at p. 865; 48 L. J. Ch. 783; 41 L. T. 219; 28 W. R. 200 - - - - - 85
Sutton *v.* Baillie (1891), 65 L. T. 528 - - - 111, 113

Taddy *v.* Sterious, [1904] 1 Ch. 354; 73 L. J. Ch. 191; 89 L. T. 628; 52 W. R. 152; 20 T. L. R. 102 - - - - 15
Taite *v.* Gosling (1879), 11 C. D. 273; 48 L. J. Ch. 397; 40 L. T. 251; 27 W. R. 394 - - - - - - 45
Talbot *v.* Blindell, Walton, J., November 13th, 1905, unreported - 73
Tasker *v.* Small (1837), 3 My. & C. 63; 1 Coop. C. C. 61, n. - 4
Taylor *v.* Lon. and County Banking Co., [1901] 2 Ch. 231; 70 L. J. Ch. 477; 84 L. T. 397; 49 W. R. 451 - - 25, 30
Teape *v.* Douse (1905), 92 L. T. 319; 21 T. L. R. 271 - 20, 74, 75
Tebb *v.* Cave, [1900] 1 Ch. 642; 69 L. J. Ch. 282; 82 L. T. 115; 48 W. R. 318 - - - - - - 75, 111
Tendring Union (Guardians of) *v.* Dowton, [1891] 3 Ch. 265; 61 L. J. Ch. 82; 65 L. T. 434; 40 W. R. 145 - - 34, 38
Thomas *v.* Hayward (1869), L. R. 4 Ex. 311; 38 L. J. Ex. 175; 20 L. T. 814 - - - - - - - 65
Thornewell *v.* Johnson (1881), 50 L. J. Ch. 641; 44 L. T. 768; 29 W. R. 677 - - - - - - 28, 88

PAGE
Thornton *v.* France, [1897] 2 Q. B. 143; 66 L. J. Q. B. 705; 77 L. T. 38; 46 W. R. 56 - - - - - - 38
Thursby *v.* Plant (1669), 1 Wms. Saund. 277 (1871 ed.), p. 241 (1824 ed.) - - - - - - - 64
Tindall *v.* Castle (1893), 62 L. J. Ch. 555; 3 R. 418; W. N. (1893) 40 - - - - - - - 53, 59
Tipping *v.* Eckersley (1855), 2 K. & J. 270 - - - 95
Tod-Heatly *v.* Benham (1888), 40 C. D. 80; 58 L. J. Ch. 83; 60 L. T. 641; 37 W. R. 38 - - - - 81, 86
Toleman *v.* Portbury (1870), L. R. 5 Q. B. 288; 39 L. J. Q. B. 136; 22 L. T. 33; 18 W. R. 579 - - - - 73
Tolhurst *v.* Associated Portland Cement Manufacturers (1900), [1902] 2 K. B. 668; [1903] A. C. at p. 420 - - 4, 5, 69
Tucker *v.* Vowles, [1893] 1 Ch. 195; 62 L. J. Ch. 172; 67 L. T. 763; 41 W. R. 156 - - - - - 57, 59
Tulk *v.* Moxhay (1848), 11 Beav. 571; 2 Ph. 774; 1 Hall & Tw. 105; 18 L. J. Ch. 83; 39 W. R. 547 - - - 1, 9, 10, 13
Turner *v.* Moon, [1901] 2 Ch. 825; 70 L. J. Ch. 822 - 111, 113
Tweddle *v.* Atkinson (1861), 1 B. & S. 393 - - - 3

Vernon *v.* Smith (1821), 5 B. & Ald. 1 - - - 66, 67
Vowles *v.* Bristol Building Society (1900), 44 Sol. J. 592 - - 108
Vyvyan *v.* Arthur (1823), 1 B. & C. 410; 2 D. & R. 670; 1 L. J. (O. S.) K. B. 138 - - - - - 67, 68

Wallis and Barnard's Contract, In re, [1899] 2 Ch. 515; 68 L. J. Ch. 753; 81 L. T. 382; 48 W. R. 57 - - - 108
Wauton *v.* Coppard, [1899] 1 Ch. 92; 68 L. J. Ch. 8; 79 L. T. 467; 47 W. R. 472 - - - - - 81, 86
Webb *v.* Fagotti Brothers (1899), 70 L. T. 683 - - - 79
Western *v.* Macdermott (1866), L. R. 1 Eq. at p. 506; 2 Ch. 72; 36 L. J. Ch. 76; 15 L. T. 641; 12 Jur. N. S. 366; 15 W. R. 265 - - - - - - 12, 45, 54, 55, 98
Weston *v.* Managers of Metropolitan Asylum District (1882), 9 Q. B. D. 404; 51 L. J. Q. B. 399; 46 L. T. 580; 30 W. R. 623 - - - - - - - - 92
Whatman *v.* Gibson (1838), 9 Sim. 196 - - - 9, 49
White and Smith's Contract, In re, [1896] 1 Ch. 657 - 103, 104
White *v.* Southend Hotel Company, [1897] 1 Ch. 767; 66 L. J. Ch. 387; 76 L. T. 273; 45 W. R. 434 - - - - 70
Whitehouse *v.* Hugh, [1906] 2 Ch. 283; 75 L. J. Ch. 677; 95 L. T. 175 - - - - - - 58, 59

PAGE

Wickenden *v.* Webster (1856), 6 E. & B. 387; 25 L. J. Q. B. 264; 2 Jur. N. S. 590; 4 W. R. 562 - - - - 84

Wilkinson *v.* Rogers (1862), 2 D. J. & S. 62; 10 Jur. N. S. 162; 12 W. R. 284 - - - - - - 67, 79

Wm. Brandt & Co. *v.* Dunlop Tyre Co., [1905] A. C. at p. 462 - 5

Williams *v.* Lambe (1790), 3 Bro. C. C. 263 - - - 35

Willmott *v.* Barber (1880), 15 C. D. 96; 43 L. T. 95; 28 W. R. 911 - - - - - - - - 90

Wills *v.* Attenborough (1871), 24 L. T. 312 - - - 88

Willson *v.* Love, [1896] 1 Q. B. 626; 65 L. J. Ch. 474 - - 91

Wilson *v.* Hart (1866), L. R. 1 Ch. 463; 35 L. J. Ch. 569; 14 L. T. 499; 12 Jur. N. S. 460 - - - - 12, 18, 27

Wilson *v.* Twamley, [1904] 2 K. B. 99; 73 L. J. K. B. 703; 90 L. T. 751; 53 W. R. 529; 20 T. L. R. 440 - - 74

Wolverhampton and Walsall Rail. Co. *v.* Lon. & N. W. Rail Co. (1873), L. R. 16 Eq. 433 at p. 439; 43 L. J. Ch. 131 - - 3

Wood *v.* Cooper, [1894] 3 Ch. 671; 63 L. J. Ch. 845; 71 L. T. 222; 43 W. R. 201; 8 R. 517 - - - - 83, 86

Woodall *v.* Clifton, [1905] 2 Ch. 264 - - - - 1

Worsley *v.* Swann (1882), 51 L. J. Ch. 576 - - - 79

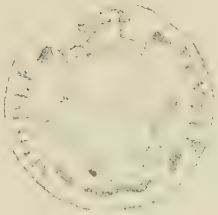
Wright *v.* Berry (1903), 19 T. L. R. 259 - - - - 78

Zetland (Earl of) *v.* Hislop (1882), 7 App. Cas. 427 - 22, 101

TABLE OF STATUTES.

PAGE

21 Jac. 1, c. 16, s. 3 90
3 & 4 Will. 4, c. 27 (Statute of Limitations, 1833), s. 17 31
c. 42 (Limitations), s. 3 90
7 & 8 Vict. c. 76, s. 11 49
8 & 9 Vict. c. 106 (Real Property Limitation Act, 1845),
s. 5 49
s. 68 36
s. 81 35
23 Vict. c. 27 (Licensing Act, 1860) 87
37 & 38 Vict. c. 57 (Real Property Limitation Act, 1874), s. 5..... 31
c. 78 (Vendor and Purchaser Act, 1874), s. 2, sub-s. 1 28
38 & 39 Vict. c. 55 (Public Health Act, 1875), s. 257..... 38
c. 87 (Land Transfer Act, 1875),
s. 3 113
s. 8 113
s. 18 32
s. 30 .....33, 35
s. 32 111
s. 49 33
s. 50 34
s. 52 34
s. 84 34
44 & 45 Vict. c. 41 (Conveyancing Act, 1881),
s. 3, sub-s. 1 28
s. 13, sub-s. 1..... 28
45 & 46 Vict. c. 39 (Conveyancing Act, 1882), s. 3, sub-ss. 1 and 2 28
60 & 61 Vict. c. 35 (Land Transfer Act, 1897)..... 35
s. 16, sub-s. 1 (ii) 113
sub-s. 3 112



RESTRICTIVE COVENANTS.

CHAPTER I.

THE ORIGIN OF THE DOCTRINE IN TULK *v.* MOXHAY.

The equitable doctrine with reference to the burden of restrictive covenants, generally known as "the doctrine of *Tulk* v. *Moxhay*," is a creation of equity which cannot, it is conceived, be supported upon any recognised principle. It is an exception alike to the well-established rule that you cannot attach to land a burden which is unknown to the law, and to the rule against perpetuities (*a*). It has been suggested that the doctrine is an ancient one, but it was really evolved during the first half of the nineteenth century, and may be correctly described as a "new burden imposed upon the use of property" by the Court of Chancery (*b*).

(*a*) The proposition in the text is founded on the dictum of Jessel, M. R., which is controverted in Gray on Perpetuities, p. 252. The proposition stated by Gray that the rule against perpetuities has no application to *present* interests seems to be supported by the dictum of Farwell, L. J., in *Muller* v. *Trafford*, [1901] 1 Ch. at p. 61; but see *contra* the judgment of Warrington, J., in *Woodall* v. *Clifton*, [1905] 2 Ch. at pp. 264, 265.

On the other hand, the ground upon which Kay, J., held that the rule against perpetuities did not apply to restrictive covenants, viz., that such covenants were "mere contracts" (43 C. D. at p. 279), *i.e.*, personal contracts, cannot, it is submitted, be supported.

(*b*) Per Willes, J., in *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. at p. 326. The case of *Martin* v. *Nutkin* (1724), 2 P. Wms. 266, is sometimes referred to, but in that case there was privity of contract, since the

The doctrine never received any countenance from Lord Eldon; neither V.-C. Shadwell, who was the first to enforce it, nor Lord Cottenham, who first stated it in an authoritative form, ever attempted to support it upon any logical principle. Sir George Jessel simply accepted it as he found it, and defined its operation in a manner now generally approved. Some judges, such as Lord Romilly, maintained that the burden of the covenant ran with the land at law, and that equity was merely enforcing a legal right. Others, such as Lord Justice Cotton, considered that the burden rested on the conscience of the purchaser, probably upon the analogy of the assignment of future property, which, although not recognised at law, operates in equity by way of agreement binding the conscience of the assignor. But the doctrine as to equitable assignments, although it does not necessarily depend upon the right to specific performance, is derived from the principle that equity considers that done which ought to be done; and this principle cannot, it is conceived, be applied to a contract to create a burden upon property which neither at the date of the contract nor at any future time could be carried into execution at law. The explanation of the doctrine given by Lord St. Leonards (*c*), is really based on the assumption that the jurisdiction of equity to enforce a negative stipulation by injunction was equivalent to specific performance, and consequently attended by the same incidents of constructive trusts and equitable estates (*d*). But the expression "specific performance" presupposes an executory, as distinct from an executed, agreement; something remaining to be done, such as the execution of a deed or conveyance, in order to put the parties in the position relative to each other in which, by the preliminary agreement, they were intended to be

covenantor was a corporation. Cf. judgment of Lord Brougham in *Keppell* v. *Bailey* (1834), 2 M. & K. at p. 539.

(*c*) Sugd. V. & P. 14th ed. pp. 802 *et seq.*

(*d*) See *infra*, p. 14.

placed (*e*). The doctrine of equity which raises an equitable estate in the covenantee and imposes a constructive trust upon the covenantor, merely places the parties in the same position as if the preliminary contract had been duly performed. Now, in the case of a restrictive covenant, even if it be treated as an executory contract to create a perpetual restraint against building or trading on particular property, there can be no right to specific performance in the true sense of the expression, because, however conscientiously the covenantor endeavours to perform his contract, he cannot by any deed of his bind the land at law. Moreover, the theory that a negative stipulation, enforceable by injunction as against the original covenantor, binds the conscience of the covenantor's assignee, if carried to its logical conclusion, would apply to chattels as well as land, and this seems to be a *reductio ad absurdum*.

Before reviewing the early cases as to restrictive covenants it may be convenient briefly to consider the rules of common law as to privity of contract and privity of estate, and the extent to which those rules have been recognised in Courts of equity.

Privity of Contract.

Privity of contract at common law only subsists as between persons who are parties to the contract either by name or by agency (*f*). A contract between two persons, A. and B., for valuable consideration as between themselves to do an act for the benefit of a third person, C., could not be enforced by C., unless one of the contracting parties either was in fact or purported to be his agent (*g*). Although after a time the Courts of common law did to a certain extent recognise the assignment of the benefit of a

(*e*) Per Lord Selborne in *Wolverhampton and Walsall Rail. Co.* v. *Lon. & N. W. Rail. Co.* (1873), 16 Eq. at p. 439.

(*f*) See judgment of Vaughan Williams, L. J., *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. at p. 155.

(*g*) *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393.

contract, such assignment did not create privity between the assignee and the covenantor, and the assignee could only sue in the name of the covenantee (*h*).

The legal impediment to the assignment of the benefit of a contract was, however, more a question of procedure than of principle, and was got over in practice before the Judicature Act by taking a letter of attorney from the covenantee to sue in his name. On the other hand, the rule that the burden of a contract could not be assigned rested on the principle that a person cannot take advantage of that which is *res inter alios acta*. It may be said to be a fundamental principle of English common law, which after some hesitation has been acknowledged by the Courts of equity, that the assignment of the burden of a contract does not release the covenantor, or create any privity between the assignee and the covenantee. Such privity can only be created by what is sometimes called novation, that is to say, a tripartite agreement whereby the original covenantor is released and a new contract entered into upon the terms of the old, between the covenantee and the assignee of the covenantor (*i*).

The common law rules as to privity of contract were to some extent modified by equity jurisprudence. While recognising the common law rule that a stranger to a contract cannot enforce it (*j*), the Courts of equity held that if the covenantee entered into the contract as trustee for a third party, such third party might derive an equitable right and enforce the agreement as *cestui que trust* (*k*). Moreover, the Courts of equity were not hampered by the

(*h*) Per Collins, M. R., *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1902] 2 K. B. at p. 668; per Cozens-Hardy, L. J., *Fitzroy* v. *Cave*, [1905] 2 K. B. p. 372.

(*i*) *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146.

(*j*) *Colyear* v. *Lady Mulgrave* (1836), 2 Keen, 51; *Tasker* v. *Small* (1837), 3 My. & Cr. 63.

(*k*) *Gregory* v. *Williams*, 3 Mer. 582, decided by Sir W. Grant in 1817.

technicalities of the common law with regard to the assignment of the benefit of a contract. Where there was no question of personal confidence or skill, it was held in equity that the benefit of a contract was assignable, and could be enforced by the assignee by the simple device of making the assignor a co-defendant in the action (*l*). Again, no importance was attached in equity to the form or language of the assignment, provided that the intention to assign was sufficiently plain. An equitable assignment need not be addressed to the assignee; it may be addressed to the covenantor, and it may be couched in the language of request or of mere permission (*m*).

Having overcome the technicalities of the common law with regard to the assignment of the benefit of a contract, it would seem that for a time the equity judges were inclined to tamper with the rule as to the assignment of the burden by a mistaken application of the doctrine of specific performance. Thus it was held by Lord Thurlow, in the year 1790, that an equitable assignee of a lease between whom and the lessor there existed no privity of contract or estate could nevertheless be sued in equity by the lessor for specific performance of the covenants in the lease (*n*). This decision, although never followed, except in the single case of *Flight* v. *Bentley* (*o*), an authority subsequently repudiated by the judge (V.-C. Shadwell) who decided it, was not finally overruled until the year 1857 (*p*). The decision of Lord Loughborough, in *Barret* v. *Blagrave* (*q*), in which a lessor obtained an injunction against an underlessee and his wife to restrain them from carrying on a restaurant in breach of a restrictive covenant in the head lease, must, it is conceived, be

(*l*) *Tolhurst* v. *Associated Portland Cement*, [1903] A. C. at p. 420.
(*m*) *Wm. Brandt & Co.* v. *Dunlop Tyre Co.*, [1905] A. C. at p. 462.
(*n*) *Lucas* v. *Comerford* (1790), 3 Bro. C. C. 166.
(*o*) (1835), 7 Sim. 149.
(*p*) *Cox* v. *Bishop* (1857), 8 D. M. & G. 815.
(*q*) (1800), 5 Ves. 555.

ascribed to the same mistaken view. The case is treated simply as a question of specific performance, and no reference is made to the absence of privity or to the question whether the defendants had notice of the restriction. The injunction was subsequently dissolved by Lord Eldon on the ground of acquiescence (*r*).

Privity of Estate.

In addition to the personal privity known as privity of contract the common law also recognised another sort of privity, viz., privity of estate as between persons who are "in of the same estate" as the original covenantee and covenantor.

This privity of estate of course exists between the lessor and the assignee of the lease, and between the lessee and the assignee of the reversion. But inasmuch as an underlease does not embrace all the estate of the assignor, "no privity exists between underlessees and the original lessor, and the covenants entered into between the latter and the original lessee, though they be covenants which run with the land, cannot affect either by way of right or liability the underlessee personally" (*s*).

In order, however, to make a defendant liable on a covenant at common law, in the absence of privity of contract, it was necessary to show *not only that there was privity of estate, but also that the covenant ran with the land*. A collateral covenant could not be enforced even where there was privity of estate. Privity of estate cannot, it is submitted, be confined to the relation of landlord and tenant (*t*), but also extends to covenants entered into between owners in fee simple (*u*), and

(*r*) (1801), 6 Ves. 104. See comments on this case in *Lumley* v. *Wagner* (1852), 1 D. M. & G. at pp. 615, 616.

(*s*) Platt on Leases (ed. 1847), Vol. I. p. 102.

(*t*) *David* v. *Sabin*, [1893] 1 Ch. 523.

(*u*) *Middlemore* v. *Goodale*, Cro. Car. 503; *Campbell* v. *Lewis* (1820), 3 B. & Ald. at p. 396.

it is clear that the *benefit* of a covenant (*x*), as in the case of a covenant for title, may run as between owners in fee with the land of the covenantee (*y*). It has, however, been established by a series of decisions that a covenant entered into by the owner of an estate is not at law binding on his assignee; *not*, it is presumed, because there is no privity of estate, but because the *burden* of such a covenant does not run with the land. It must, however, be remembered that it was for many years generally assumed (*z*) that the burden of a covenant might run with the land, even when the parties did not stand in the relation of lessor and lessee towards each other (*a*).

Then the suggestion seems to have been made, at first somewhat tentatively, that the doctrine of covenants running with the land would be carried further in a Court of equity than in a Court of law. This theory appears to have been first propounded in the well-known case of the *Duke of Bedford* v. *The Trustees of the British Museum* (*b*), in the year 1822, by the plaintiff's counsel, Mr. (afterwards V.-C.) Shadwell (*c*), and also, it would seem, by V.-C. Leach, in the Court below, although the judgment of the V.-C. is nowhere fully reported (*d*). The suggestion shows that the equitable doctrine as to restrictive covenants

(*x*) "I see no difficulty in holding that the benefit of a covenant runs with the land of the covenantee, while the burden of the same covenant does not run with the land of the covenantor." Per Farwell, J., in *Rogers* v. *Hosegood*, [1900] 2 Ch. at p. 395; but cf. *Norval* v. *Pascoe*, 10 Jur. N. S. 793.

(*y*) The benefit of a restrictive covenant may, it seems, run with the land "in contemplation as well of equity *as of law*." [1900] 2 Ch. at p. 407.

(*z*) Cf. *Collins* v. *Plumb* (1810), 16 Ves. 457.

(*a*) See *Holmes* v. *Buckley* (1691), 1 Eq. Ca. Abr. 27; *Morland* v. *Cook*, 6 Eq. 252; *Cooke* v. *Chilcott*, 3 C. D. 694.

(*b*) 2 My. & K. 552.

(*c*) *Ibid.* at p. 559.

(*d*) Sugd. V. & P. 14th ed. p. 799. But if the V.-C. held this view it is strange that he should have referred the case to a Court of law.

was to a large extent merely an extension in equity of the doctrine in *Spencer's Case* (*e*).

The Decision in Keppell *v.* Bailey.

The law was in this confused and indefinite state when, in 1834, the case of *Keppell* v. *Bailey* (*f*) came before Lord Brougham. The main question in that case was whether the assignees of the Beaufort Works were bound by a covenant entered into by their predecessors in title to procure all limestone used in the works from the Trevil Quarry. In the learned and exhaustive arguments numerous questions of law were discussed, such as perpetuity, want of mutuality, and restraint of trade, and also, of course, the question whether the covenant ran with the land at law.

But the most important argument is that advanced by Sir E. Sugden (*g*), viz., that "the notice which, prior to their purchase, the defendants had received of the existence and nature of the covenant, imposed an obligation which *bound them in conscience*, and which a Court of equity would not suffer them to violate." Here we have, for the first time, the doctrine that a restrictive covenant is a burden on the conscience of the assignee.

Lord Brougham, in a lengthy judgment, held that the covenant did not run with the land, and that there was no privity of estate between the plaintiff and defendant. Lastly, he dealt with the argument above cited as follows: "The knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorises him to affect by his contracts, had attempted to create a real burden upon property which is inconsistent with the nature of that property, and unknown to the

(*e*) See judgment of Jessel, M. R., in *L. & S. W. Railway* v. *Gomm*, 20 C. D. at p. 583.

(*f*) 2 M. & K. 516.

(*g*) At p. 526.

principle of law cannot bind such assignee by affecting his conscience" (*h*).

It would seem, however, that the decision of Lord Brougham did not find favour in the eyes of equity lawyers, and it was ignored by V.-C. Shadwell in two subsequent cases (*i*). Yet, in the year 1845 (*k*), and even as late as the year 1847 (*l*), we find V.-C. Knight-Bruce treating it as an open question, whether an assignee with notice was bound by the restrictive covenant, which is all the more remarkable because only a few years later (*m*) the same judge treated the doctrine of *Tulk* v. *Moxhay* as being of ancient origin, and afterwards carried what he conceived to be this doctrine much further than any other judge (*n*).

Even Lord Cottenham did not seem very sure of his ground, since, in *Mann* v. *Stephens*, he ordered a motion for an injunction to stand over, with liberty for the plaintiff to bring an action upon the covenant at law (*o*).

It is, therefore, submitted that the decision in *Tulk* v. *Moxhay* in the year 1848, if not "the earliest of the cases" (*p*), is the first authoritative pronouncement with reference to the burden of restrictive covenants affecting land.

(*h*) At p. 547.

(*i*) *Whatman* v. *Gibson*, 9 Sim. 196; *Mann* v. *Stephens*, 15 Sim. 377.

(*k*) *Bristow* v. *Wood*, 14 L. J. Ch. 50.

(*l*) *Moxhay* v. *Inderwick*, 1 De G. & Sm. at p. 712.

(*m*) In 1854; see *Coles* v. *Sims*, 23 L. J. Ch. at p. 258.

(*n*) In *De Mattos* v. *Gibson*, 4 De G. & J. 276, referred to *infra*, p. 13.

(*o*) 15 Sim. p. 379; but this may have been on the ground that the injunction was too indefinite. See *Keates* v. *Lyon*, 4 Ch. App. at p. 225.

(*p*) Per Cotton, L. J., *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. at p. 409.

CHAPTER II.

THE NATURE OF THE EQUITABLE BURDEN CREATED BY A RESTRICTIVE COVENANT.

The Decision in Tulk v. *Moxhay.*

The decision of Lord Cottenham in *Tulk* v. *Moxhay* (*a*) was given with reference to a covenant, affirmative in form but negative in substance, entered into upon the sale in 1808 of the Leicester Square Garden, and whereby one Elms, the purchaser, covenanted to keep the garden "in an open state uncovered by any buildings." The plaintiff Tulk was the original covenantee, and both at the date of the covenant and of the action was the owner of several houses in the square. It is therefore to be observed that in this case no question arose as to the assignment of the benefit of the covenant, or the interest of the plaintiff in enforcing it. The sole question was whether the defendant, who claimed under the original covenantor and admitted that he purchased with notice, was bound by the covenant. In the first part of his judgment Lord Cottenham seems to treat the covenant as binding the conscience of the assignee, for he lays stress on the fact that the defendant, having bought with express notice of the covenant, regulated the price accordingly, an argument which seems to have subsequently had great weight with Lord Justice Cotton (*b*). In the latter part of his judgment, however, Lord Cottenham describes the restriction as "an equity attached to land by the owner."

"That the question does not depend upon whether the

(*a*) 2 Ph. 774.

(*b*) *Hall* v. *Ewin*, 37 C. D. at p. 79; *Clegg* v. *Hands*, 44 C. D. at p. 519.

covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, the Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." This proposition is somewhat vague, since it does not define what species of equity can be attached to property, or to what species of property it can be attached. Finally, Lord Cottenham dealt very briefly with the decision in *Keppell* v. *Bailey* (*c*), merely saying that Lord Brougham never could have meant to lay down that this Court would not enforce an equity attached to the land by the owner unless under such circumstances as would maintain an action at law.

The Restriction an Equitable Burden on Land.

We have seen that, prior to the decision in *Tulk* v. *Moxhay*, there had been three different theories advanced with reference to the operation of restrictive covenants, viz., (1) that the burden ran with the land at law; (2) that equity had power not merely to follow, but to extend the legal rules as to covenants running with the land; and (3) that the covenant was a burden upon the conscience of the assignee. Lord Cottenham for the first time laid down the principle, now generally accepted, that a restrictive covenant creates an equitable burden on land. "The principle of *Tulk* v. *Moxhay*," said Lord Lindley, nearly forty years after the decision (*d*), "imposes a burden on the land."

If the covenant be negative so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached to the property of such a nature that *it is annexed to it and runs with it in equity.*

(*c*) 2 My. & K. 552.
(*d*) *Hall* v. *Ewin*, 37 C. D. at p. 81.

This equity, although created by covenant or contract, cannot be sued on as such, but stands on the same footing with, and is completely analogous to, an equitable charge on real estate created by some predecessor in title of the present owner of the land charged (*e*).

Alternative Theories as to the Nature of the Burden.

It must not, however, be supposed that this explanation of the doctrine in *Tulk* v. *Moxhay* was at once accepted; on the contrary, until quite recently it was considered doubtful whether a covenant can run with the land in equity (*f*).

The explanation of the operation of a restrictive covenant as a burden on the conscience of the assignee seems to have been generally accepted prior to the year 1882, and it was certainly the one adopted by Cotton, L. J. (*g*), and Knight-Bruce, L. J., and probably, also, by Lord Hatherley and Fry, L. J. Some of the judges, notably V.-C. Malins, Lord Romilly and Turner, L. J. (*h*), still clung to the theory that the burden of a covenant might run with the land at law, as between owners in fee simple, a theory which seems to have been recognized by the legislature in the 84th section of the Land Transfer Act, 1875.

This theory seems to have been abandoned about the year 1878 (*i*); but as late as the year 1880 Jessel, M. R., assumed, for the purpose of argument, that covenants ran

(*e*) *Nisbet and Potts' Contract*, [1905] 1 Ch. 396, 397.

(*f*) See *dictum* of Rigby, L. J., in *Rogers* v. *Hosegood*, [1900] 2 Ch. at p. 401.

(*g*) See *dicta* in *Fairclough* v. *Marshall*, 4 Ex. D. at p. 48; *Hayward* v. *Brunswick Building Society*, 8 Q. B. D. at p. 409; *Hall* v. *Ewin*, 37 C. D. at p. 79; *Clegg* v. *Hands*, 44 C. D. at p. 519.

(*h*) See *Western* v. *Macdermott*, 1 Eq. at p. 506; *Wilson* v. *Hart*, 1 Ch. at p. 466.

(*i*) *Renals* v. *Cowlishaw*, 9 C. D. 129. This theory was finally exploded in 1885 by the decision in *Austerberry* v. *Corporation of Oldham*, 29 C. D. 750.

with the land at law (*ii*). As a rule, however, the judges considered this question to be immaterial.

Thus in the year 1856 we find Lord Hatherley (then Wood, V.-C.), saying, "The Court does not feel itself embarrassed by the consideration whether a covenant does or does not run with the land, but looks upon it as a *contract* which, in either case, may afford a ground for relief" (*k*). Fry, J., appears to have regarded the principle of *Tulk* v. *Moxhay* as merely a "development of the equitable dotrine of notice" (*l*). This doctrine reached its high-water mark in the case of *De Mattos* v. *Gibson* (*m*), where Knight-Bruce, L. J., is reported to have laid down a general rule applicable alike to *personalty* as well as realty, that when a man by gift or purchase acquires property from another with knowledge of a previous contract "the acquirer shall not, to the material damage of a third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." It was, of course, established at any rate as early as the year 1846 (*n*), that a purchaser for value who acquires the legal estate with notice of a prior contract of sale entered into by the vendor is bound by that contract, and that the Court will, in a suit for specific performance by the first purchaser against the vendor and the second purchaser, decree the latter to convey the estate to the plaintiff. But the interference of equity in such a case, as pointed out by Lord Cottenham (*o*), is based on the principle that the first purchaser

(*ii*) *Re Mercer and Moore*, 14 C. D. at p. 292.

(*k*) *Johnston* v. *Hall*, 2 K. & J. at p. 422; and cf. Knight-Bruce, L. J., in *Eastwood* v. *Lever*, 4 D. J. & S. at p. 122, "on the ground merely of *contract*."

(*l*) 7 C. D. at pp. 735, 736.

(*m*) 4 De G. & J. 282.

(*n*) *Potter* v. *Sanders*, 6 Hare, 1.

(*o*) *Heathcote* v. *The North Staffordshire Rail. Co.* (1850), 2 Mac. & G. at p. 112.

"would by the contract have obtained an interest in the estate itself, which in the case of goods he would not." The first purchaser having an equitable estate in the property has a clear right as against any person even *without notice* whose claim is not to the legal estate, but who has merely got an equitable interest subsequent in point of time, and it is only when the second purchaser has acquired the legal estate that the question of notice is material (*p*). The same principle applies to a contract for a lease or settlement or any other contract creating an equitable interest in land, viz., that the right of the plaintiff depends on his equitable estate and not upon any doctrine of a burden on the conscience of the assignee created by notice of the contract; and it is submitted that unless there is an equitable estate there is no right of action in the absence of legal privity (*q*).

In *Hobson* v. *Gorringe* (*r*) it was assumed (but not decided) by the Court of Appeal that a contractual right to remove fixtures might be binding on an assignee of the property with notice of the contract, but this may be explained on the ground that the right of removal created an equitable interest in the land (*s*).

It is true that in some cases when a contract is *executory* the Court will grant an injunction not only against the covenantor but also against a third party who induces or makes himself a party to the breach, as in the celebrated case of *Lumley* v. *Wagner*, where the injunction was extended to Gye (*t*). But this is the furthest extent to which the Court is disposed to go (*u*), and it is only in this

(*p*) *Flinn* v. *Fountain*, 58 L. J. Ch. 389, at p. 391.

(*q*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. at p. 50.

(*r*) [1897] 1 Ch. at p. 192.

(*s*) *Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575.

(*t*) 1 D. M. & G. 604; see also *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37 at p. 51.

(*u*) *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146.

sense that the *dictum* of Knight-Bruce, L. J., can be accepted as sound (*x*).

It is therefore submitted that the doctrine that a restrictive covenant creates a burden on the conscience of the assignee is wholly fallacious. In several recent cases attempts have been made to carry this doctrine to its logical conclusion by making negative stipulations run in equity with personal chattels. The Courts have, however, refused to enforce a negative stipulation as to goods against an assignee with notice who was not privy to the contract (*y*).

Analogy to an Easement.

It was at one time supposed that the principle of *Tulk* v. *Moxhay* was not confined to restrictive covenants. It was assumed that a man could attach an equity to property to perform an obligation as well as to observe a restriction, and this was certainly the view of Lord Romilly (*z*), and V.-C. Malins (*a*), and even of Baron Bramwell (*b*). It was, however, held by the Court of Appeal in *Haywood* v. *Brunswick Building Society* (*c*), that the principle of *Tulk* v. *Moxhay* only applied to "covenants which can be complied with without the expenditure of money." The owner of land cannot be compelled "to put his hand into his pocket."

In the following year (*d*) Sir George Jessel explained the nature of the equitable burden as "an extension in equity of the doctrine of negative easements, such, for instance, as a right to the access of light which prevents the owner of

(*x*) *Formby* v. *Barker*, [1903] 2 Ch. at p. 558.

(*y*) *Elliman* v. *Carrington*, [1901] 2 Ch. 275; *Taddy* v. *Sterious*, [1904] 1 Ch. 354; *McGruther* v. *Pitcher*, [1904] 2 Ch. 306.

(*z*) *Morland* v. *Cook*, 6 Eq. at p. 265.

(*a*) *Cooke* v. *Chilcott*, 3 C. D. at p. 700.

(*b*) *Aspden* v. *Seddon*, 1 Ex. D. at p. 502.

(*c*) 8 Q. B. D. 403.

(*d*) *Gomm's Case*, 20 C. D. at p. 583.

the servient tenement from building so as to obstruct the light"; and this analogy has been accepted and developed in two recent decisions of the Court of Appeal (*e*). A restrictive covenant has, in fact, all the characteristics of an easement (*f*), except that it cannot be created by prescription or grant, and, being an equitable charge, is liable to be defeated by the acquisition of the legal estate for value and without notice.

The nearest analogy to the quasi-easement created by a restrictive covenant is the equitable interest resulting from an agreement to grant an easement which is binding in equity (*g*), and can only be defeated by purchase for value without notice (*h*). But this analogy is not wholly convincing, since in the latter case the equitable estate arises out of the doctrine that equity regards that as done which ought to be done.

Easements may be of various characters, and it is a fallacy to suppose that every easement must be brought within some particular class which has been recognised, such as the class relating to watercourses, light, or air, or otherwise (*i*). But the common law has always refused to recognise any arbitrary fetter upon the enjoyment of land such as a servitude of prospect (*k*); and the assumption in Gale on Easements (*l*) that such an easement can be created by grant is, it is submitted, unfounded. "The law," said Mellish, L. J., "will not allow the owner of land to attach an unusual and unknown covenant to the land so

(*e*) *Formby* v. *Barker*, [1903] 2 Ch. 539; *Nisbet and Potts' Contract*, [1905] 1 Ch. 391; [1906] 1 Ch. 416.

(*f*) "Servitutum non ea natura est ut aliquid faciat quis; sed ut aliquid patiatur aut non faciat." Dig. 8, *De Servitutibus*.

(*g*) Gale on Easements, p. 58; *Att.-Gen.* v. *Biphosphated Guano Co.* (1878), 11 C. D. 327; *May* v. *Belleville*, [1905] 2 Ch. 605.

(*h*) *Prinsep* v. *Belgravian Estate, Ltd.*, W. N. (1896) 39.

(*i*) *Simpson* v. *Mayor of Godmanchester*, [1896] 1 Ch. at p. 219, per Lord Herschell.

(*k*) *Aldred's Case* (1611), 9 Rep. 58 b.

(*l*) Page 295.

that a man who buys the property in the market without knowing that it is subject to any such burthen would find that some previous owner had professed to bind all subsequent owners by an obligation not to obstruct the view which somebody else would have from the windows of his house" (*m*). "Incidents of a novel kind cannot be devised and attached to property at the caprice of any owner" (*n*). A new species of incorporeal hereditament cannot be created at the will and pleasure of an individual owner of an estate; he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by Act of Parliament (*o*).

This rule of common law, which was also enunciated by Lord Brougham in *Keppell* v. *Bailey* (*p*), has recently been accepted by the Court of Appeal (*q*).

The equitable burden created by a restrictive covenant must therefore be regarded as *sui generis*, and as an exception made by Courts of equity to the rule of common law above referred to.

(*m*) *Leech* v. *Schweder* (1874), 9 Ch. at p. 475.

(*n*) *Bailey* v. *Stevens* (1862), 31 L. J. C. P. at p. 230, per Byles, J.

(*o*) *Hill* v. *Tupper* (1863), 2 H. & C. 121, per Pollock, C. B., at pp. 127, 128.

(*p*) 2 M. & K. at p. 535.

(*q*) *Great Northern Railway* v. *Inland Revenue*, [1901] 1 Q. B. at pp. 428, 429.

CHAPTER III.

PERSONAL AND COLLATERAL COVENANTS.

From the proposition that a restrictive covenant is analogous to an easement, it seems to follow as a necessary and logical corollary that the doctrine of *Tulk* v. *Moxhay* does not apply where the covenant is personal either to the covenantor or the covenantee. An easement is a right ancillary to the enjoyment of land, and the doctrine must be regarded as involving the relation of two estates one to the other. But this explanation of the doctrine has not found universal acceptance.

Covenants personal to the Covenantor.

In *Wilson* v. *Hart* (*a*), one Robinson, the purchaser of a freehold house, covenanted with the vendors for himself, his heirs, executors, and administrators (without mention of *assigns*) that no building on the purchased premises "should be used for the sale of any intoxicating liquor." Robinson sold the property to the defendant, Jane Hart, and the question was whether the defendant, Thompson, who was a tenant from year to year, holding under Jane Hart, was bound by the covenant. Although the decision of Turner, L. J., that the defendant, Thompson, was bound was no doubt correct, the grounds upon which he based his decision cannot, it is conceived, be supported. He expressly stated that in his view the restriction was a "mere *personal obligation* affecting the owner" (*b*). "It was, as

(*a*) (1866), 1 Ch. 463.
(*b*) *Ibid.* p. 468.

I think, a covenant applying merely to the personal use and enjoyment of the land by the grantee and *not to the permanent user* of the land itself" (*c*). Now the land sold was part of a building estate, and the mere fact that the covenant was in an impersonal form "that no building should be used, &c.," was not really material upon the question whether it was intended to attach a burden to the land (*d*). For the present purpose the importance of the decision lies in the fact that the Court, although considering the covenant to be personal, held that the defendants were bound by it because they had notice. On the other hand, in *Re Fawcett & Holmes* (*e*), the purchaser of a plot of land, after entering into various covenants on behalf of himself, his heirs, executors, administrators, and assigns, subsequently covenanted that he, "the said George Fawcett, on erecting any buildings on the said land, shall only erect" buildings of a certain description. It was held by the Court of Appeal that this was a "mere personal covenant by Fawcett," and did not bind his assignee. In *Rogers* v. *Hosegood* (*f*) the Court of Appeal laid down the broad principle that "the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely *personal and collateral*, while it is affected by notice of those which touch and concern the land."

"This passage," said Lord Justice Vaughan Williams in a later case, "assumes that the doctrine of *Tulk* v. *Moxhay* will not apply to a contract which is merely personal and collateral (*g*). There are, however, some restrictive covenants to which the doctrine of *Tulk* v. *Moxhay* applies, although, if entered into between land-

(*c*) *Ibid.* p. 466.

(*d*) Cf. *Feilden* v. *Slater* (1869), 7 Eq. 523; *Holloway Brothers* v. *Hill*, [1902] 2 Ch. 618.

(*e*) (1889), 42 C. D. 150.

(*f*) [1900] 2 Ch. at p. 407.

(*g*) *Formby* v. *Barker*, [1903] 2 Ch. at p. 552; and see *Brigg* v. *Thornton*, [1904] 1 Ch. at p. 391.

lord and tenant, they would be *collateral* in the sense that the burden would not at law run with the reversion (*h*). It is conceived that, in order to come within the above-mentioned *dictum*, the covenant must be personal as well as collateral.

Several illustrations of covenants which are personal and collateral and to which, therefore, the doctrine of *Tulk* v. *Moxhay* does not apply, are to be found in cases of covenants by landlords as to adjoining property. Thus, where A., the owner of Blackacre and Whiteacre, demises Blackacre to B., and covenants that he will not let Whiteacre for the purpose of a particular trade, or that he will not give his consent to a particular trade being carried on in Whiteacre (*i*), this does not impose an equitable burden upon Whiteacre, and although B. can enforce the covenant against his landlord, A., he has no rights against a subsequent lessee or purchaser of Whiteacre (*k*). On the other hand, if the covenant by A. is "not to let or *use*, or permit to be let or *used*," it is conceived that this would impose a restriction which would be an equitable burden on Whiteacre, and would bind every person who took with notice (*l*). The same result would, of course, follow if the covenant by A. were in an *impersonal* form, *e.g.*, that Whiteacre should not be used for a particular business or that no building should be erected on it (*m*).

(*h*) "There are undoubtedly collateral covenants which on equitable principles, but only in a restrictive sense, bind the assignee." Per Lord Russell in *Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q. B. at p. 89.

(*i*) *Stuart* v. *Diplock* (1889), 43 C. D. at pp. 349, 350.

(*k*) *Fitz* v. *Iles*, [1893] 1 Ch. 77, where the point was not taken, was clearly a mistaken decision. See *Kemp* v. *Bird* (1877), 5 C. D. 974; *Ashby* v. *Wilson*, [1900] 1 Ch. 66; *Brigg* v. *Thornton*, [1904] 1 Ch. 386.

(*l*) *Kemp* v. *Bird*, 5 C. D. at p. 977; *Baily* v. *Skinner* (1898), 42 Sol. J. 780; *Holloway Brothers* v. *Hill*, [1902] 2 Ch. 612; *Teape* v. *Douse* (1905), 92 L. T. 319. The decision in *Jay* v. *Richardson* (1862), 30 Beav. 563, can only be supported on the ground that the covenant in that case meant "permit to be used": see judgment, at p. 571.

(*m*) *Kemp* v. *Bird*, 5 C. D. at p. 553; cf. form in Key & Elph. Vol. I. p. 734.

Covenants personal to the Covenantee.

The further question arises whether, if the doctrine of *Tulk* v. *Moxhay* arises out of the relation of two properties, one to the other, it applies to a case where there is no dominant tenement—*i.e.*, where the *benefit* is not annexed to any particular *land*, but where the covenant is entered into either for the personal benefit of the covenantee, or as an adjunct to some business which he is carrying on (*n*). Lord Justice Vaughan Williams certainly appears to intimate that the doctrine does not apply where there is no dominant tenement; but there is considerable difficulty in applying this theory to many of the decided cases. In *Catt* v. *Tourle* (*o*), the plaintiff, a brewer at Brighton, sold land to the trustees of a land society, who covenanted that the plaintiff should have the *exclusive* right of supplying all beer which might be consumed on any building on the land. The defendant, a rival brewer, purchased the land from the trustees and supplied his own beer to a public-house built on the land. Now, in this case it is clear that the covenant was personal to the covenantee, or, at any rate, to his brewery business, and was not intended to be annexed to any particular land forming the site of his brewery. It was held by Selwyn and Giffard, L. JJ., that the covenant was binding on the defendant. Giffard, L. J., said (*p*) :—"Mr. Catt himself is plaintiff; therefore we have nothing to do with what the state of things might be if he had assigned the deed or had died." In *Osborne* v. *Bradley* (*q*), Farwell, J., held that if a restrictive covenant is taken simply for the vendor's own benefit, and not in

(*n*) *Formby* v. *Barker*, [1903] 2 Ch. at pp. 552, 553.

(*o*) (1869), 4 Ch. 654.

(*p*) Page 661.

(*q*) [1903] 2 Ch. 446. The learned judge said that such a covenant came within the rule enunciated by Lord Cairns in *Doherty* v. *Allman* (1878), 3 A. C. 720, but Lord Cairns was there dealing with the question of enforcing the contract *between the parties to it.*

his capacity of owner of a particular property, he can enforce it against an assign of the purchaser. On the other hand, in *Formby* v. *Barker* (*r*), the Court of Appeal held that if restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant, which cannot be enforced either by his executors or his assigns. The Court did not, however, overrule *Osborne* v. *Bradley*, which was cited in argument, and Stirling, L. J., expressed the opinion that "different considerations would apply if the action had been brought by R. H. Formby (the covenantee) in his lifetime." On the other hand, Romer, L. J., in the course of the argument (*s*), asked: "Is there any case in which it has been held that such a covenant, purporting to bind land for ever, is valid, *except for the protection of an estate?*"

Not only does this *dictum* throw considerable doubt on the decision in *Catt* v. *Tourle* (*t*), since the covenant in that case was not intended for the protection of an estate, but there are also several *dicta* in the House of Lords which tend to show that the doctrine of *Tulk* v. *Moxhay* does not apply to a tied-house covenant (*u*). In a Scotch case Lord Selborne said: "I can understand that there may be good reason for drawing a line between restrictions by which it is attempted to impose upon the feuer for the time being some *personal obligation*, and those which relate to the use or employment of the land or of buildings erected upon it, and for holding that the former cannot, while the latter may, run with the land against singular successors. This distinction would distinguish the decision upon the facts in the case of *Keppell* v. *Bailey* (*x*) with

(*r*) [1903] 2 Ch. 539.
(*s*) Page 543.
(*t*) 4 Ch. 654, *supra*, p. 21.
(*u*) *Earl of Zetland* v. *Hislop*, 7 A. C. at p. 447.
(*x*) 2 My. & K. 517; *supra*, p. 7.

other English authorities except *Catt* v. *Tourle*, as to which case *the present is not a proper occasion for expressing any opinion.*"

Again, in *Noakes* v. *Rice* (*y*), Lord Davey could not assent altogether to the assumption that a tied-house covenant "constituted or might constitute a good charge upon the property by virtue of the operation of the doctrine in *Tulk* v. *Moxhay*." In the same case (*z*) Lord Macnaghten doubted "whether such an obligation can be made to run with the land or can be imposed on the owner in respect of the property *except* as between lessor and lessee, or in the case of a mortgage during the continuance of the security."

This *dictum* is not lucid, for it is not clear how far the exception is intended to extend. Does it qualify both parts of the proposition, viz., running with the land and imposed on the owner, or only the second part? If it only qualifies the second part of the proposition, it seems to be inconsistent with a number of decisions where it has been held that the burden of such a covenant runs with the land as between landlord and tenant. On the other hand, if the exception also qualifies the first part of the proposition, viz., as to running with the land, there seems no reason why the noble lords took exception to the *dictum* of Cozens-Hardy, J., in the Court of first instance. All that Cozens-Hardy, J., held was that, during the continuance of the security, but not afterwards, the covenant imposed "a fetter upon the enjoyment of the property," which was binding on the mortgagor "and any person taking with notice" (*a*).

During the continuance of the security, a restrictive covenant entered into by a mortgagor can be enforced (*b*)

(*y*) [1902] A. C. at p. 35.
(*z*) *Ibid.* at p. 32.
(*a*) [1900] 1 Ch. at p. 219.
(*b*) *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307.

by the mortgagee where there is privity of contract, but is not binding after redemption (*d*).

Whether, however, such a restriction can be enforced against an assignee of the equity of redemption in the absence of any privity of contract, must now be considered doubtful. There is only one authority precisely in point, viz., *John Brothers* v. *Holmes* (*e*), in which Kekewich, J., held that the doctrine of *Tulk* v. *Moxhay* applied (*f*), but this decision, and the case of *Luker* v. *Dennis* (*g*), decided by Fry, J., in the year 1877, must now be regarded as doubtful, although it is believed that *Luker* v. *Dennis* was followed by the present Master of the Rolls in an unreported case.

It must be admitted that the law on this point, viz., whether the doctrine of *Tulk* v. *Moxhay* applies to a covenant personal to the covenantee and the benefit whereof cannot be annexed to any particular property, is in a state of great uncertainty. Some of the judges appear to have considered that the doctrine applied to any case in which there was a negative stipulation which might, as between the original parties to the contract, have been enforced by injunction. The doctrine, says Lord Lindley, "has often lately been relied upon as going much further than it does"; but unfortunately the noble lord does not give any clue as to the true limitations of the doctrine.

(*d*) *Noakes* v. *Rice*, [1902] A. C. 24.
(*e*) [1900] 1 Ch. 188.
(*f*) *Ibid.* pp. 196, 197.
(*g*) 7 C. D. 227. This decision is clearly wrong so far as it relates to the covenant in the mortgage deed.

CHAPTER IV.

HOW THE EQUITABLE BURDEN MAY BE DEFEATED.

The Plea of Purchaser for Value without Notice.

It is now well established that as between conflicting equitable estates in land the rule prevails *qui prior est tempore potior est jure*. It was at one time supposed that the plea of purchaser for value without notice was available even where the subject-matter purchased was only an equitable estate as against a prior equitable estate or even against a legal right enforceable in equity (*a*), and this view was favoured by Lord St. Leonards (*b*). The contrary view, supported by Lord Westbury (*c*), has, however, prevailed; but it may be doubted whether the law on the point can be regarded as having been clearly defined prior to the year 1880 (*d*).

In the absence of fraud or estoppel the plea of purchaser for value without notice can now only be set up against a prior equitable estate where the purchaser has either actually got in the legal estate or has a better title to call for it (*e*). As against a mere *equity*, however, as distinguished from an *equitable estate*, as, for example, an equity to set aside a deed, the plea of purchaser for value without notice is good although the purchaser has only an equitable estate (*f*).

(*a*) See *Att.-Gen.* v. *Wilkins* (1853), 17 Beav. at pp. 292, 293.
(*b*) Sugd. V. & P. 14th ed. p. 797.
(*c*) *Phillips* v. *Phillips* (1861), 4 De G. F. & J. at p. 215.
(*d*) *Cave* v. *Cave* (1880), 15 C. D. 639.
(*e*) *Taylor* v. *London and County Bank*, [1901] 1 Ch. at pp. 262, 263.
(*f*) *Phillips* v. *Phillips*, 4 De G. F. & J. at p. 218; *Ernest* v. *Vivian* (1863), 33 L. J. Ch. at p. 519; *Cave* v. *Cave*, 15 C. D. at p. 649.

Whether the judges prior to 1882 regarded the burden of a restrictive covenant as a mere equity, or whether they considered that, even if it created an equitable charge, the plea of purchaser for value without notice would in any case be a good defence, it is impossible to say. But it certainly is remarkable that in none of the earlier decisions is any consideration given to the question whether the purchaser had or had not the legal estate.

Sir George Jessel in *Gomm's Case* for the first time laid down definitely that since a restrictive covenant binds the land it creates an equitable charge on land, and then went on to the necessary conclusion that "if the purchaser took only an equitable estate, he took subject to the burden *whether he had notice or not*" (*g*). If the purchaser of property subject to a restrictive covenant does not acquire the legal estate, the question whether he has notice or not is immaterial. Notice is only material when the legal estate is set up, and it becomes a question of binding the conscience of the purchaser and forbidding him to set up the legal estate (*h*).

Hence it follows that a mere occupier who has no legal estate is bound whether he has notice or not (*i*), and that a voluntary assign of the legal estate or a disseisor who has acquired the legal estate by virtue of the Statute of Limitations is bound, because although he has the legal estate he is not a purchaser for value (*k*).

It is presumed, however, that the purchaser of an equity of redemption without notice would not be bound, as he would be entitled to get in the legal estate from the mortgagee. This point has not been decided.

On the other hand, it is clear that when once there has been a purchaser for value without notice who obtains the

(*g*) 20 C. D. at p. 583.
(*h*) *Nisbet and Potts*, [1905] 1 Ch. at p. 398.
(*i*) *Mander* v. *Falcke*, [1891] 2 Ch. 554.
(*k*) *Nisbet and Potts*, [1906] 1 Ch. 386.

legal estate the restriction is gone (*l*), and for this purpose a lessee is a purchaser for valuable consideration (*m*).

Hence the question of notice continues to be of primary importance.

Constructive Notice affecting Lessees.

In the earlier cases as to restrictive covenants, either actual notice was proved or the Court relied on the fact that the instrument creating the restriction was recited in the conveyance (*n*). But in order to affect lessees it soon became necessary to extend the doctrine of constructive notice. The earliest decision on the point seems to be *Parker* v. *Whyte* (*o*), in the year 1863, in which V.-C. Wood granted an injunction against a sub-lessee for infringing a restrictive covenant in the head lease. This was followed by Lord Romilly two years later in *Clements* v. *Welles* (*p*), when the restrictive covenant was not contained in the head lease, but in an assignment thereof. The under-lessee was held to have constructive notice of the covenant, Lord Romilly stating that in his opinion "an under-lessee cannot be put in any other position than he would be if he had distinct notice of the original covenant." In the following year the Court of Appeal further extended the doctrine of constructive notice by holding that a tenant from year to year had constructive notice of a restrictive covenant affecting the title to the freehold (*q*). This decision has been described by Lord Justice James as "a strong instance of legislative action on the part of the judges of this Court" (*r*). To

(*l*) *Nottingham Patent Brick Co.* v. *Butler* (1886), 16 Q. B. D. 778; *Rowell* v. *Satchell*, [1903] 2 Ch. at pp. 220, 221.

(*m*) *Att.-Gen.* v. *Hall* (1853), 16 Beav. 392. "A lease is an alienation *pro tanto*": *Att.-Gen.* v. *Payne* (1859), 27 Beav. 174.

(*n*) *Coles* v. *Sims*, 23 L. J. Ch. at p. 258.

(*o*) (1863), 32 L. J. Ch. 520.

(*p*) (1865), 1 Eq. 200.

(*q*) *Wilson* v. *Hart*, 1 Ch. 463.

(*r*) 7 Eq. at p. 530.

impute constructive notice to a mere tenant from year to year of course implies that it was negligent on his part not to call for the title to the freehold (*s*). The Vendor and Purchaser Act, 1874 (*t*), enacted that "under a contract to grant or assign a term of years the intended lessee or assign shall not be entitled to call for the title to the freehold." But notwithstanding this enactment it was held in *Patman* v. *Harland* (*u*) that a lessee has constructive notice of a restrictive covenant contained in a deed forming part of the claim of title of his lessor, and even although an express representation has been made by the lessor that no such restriction exists. Nor is the rule affected by the Conveyancing Act, 1881 (*x*), which continues the policy of the Vendor and Purchaser Act, and it is expressly preserved by sect. 3, sub-sect. (2), of the Conveyancing Act, 1882. When, however, the restriction is contained in a collateral deed so that the lessee might get a complete chain of title without notice of the restriction, it is necessary to prove that the lessee knew of the existence of the covenant (*y*).

Constructive Notice affecting Purchasers of the Fee Simple.

Prior to the decision in *Tulk* v. *Moxhay*, an action for specific performance had been brought by Moxhay with reference to his purchase of the Leicester Square Garden. In this action it was decided (*z*) that, whether or not Moxhay

(*s*) Cf. *Robson* v. *Flight*, 4 De G. J. & S. at p. 615, the case of a lessee for twenty-one years.

(*t*) 37 & 38 Vict. c. 78, s. 2, sub-s. 1.

(*u*) 17 Ch. D. 353.

(*x*) 44 & 45 Vict. c. 41, s. 3, sub-s. 1; s. 13, sub-s. 1; *Jones* v. *Lavington*, [1903] 1 K. B. 253.

(*y*) *Carter* v. *Williams* (1870), 9 Eq. 678; *Patman* v. *Harland*, 17 C. D. at pp. 357, 358; Conveyancing Act, 1882, s. 3, sub-s. 1; *Holloway Brothers* v. *Hill*, [1902] 2 Ch. 620. Bacon, V.-C., seems to have considered the question of notice immaterial. "Notice or no notice, the result is the same": *Thornewell* v. *Johnson* (1881), 50 L. J. Ch. 642.

(*z*) *Moxhay* v. *Inderwick* (1847), 1 De G. & Sm. 712.

was bound by the restrictive covenant (as between him and Tulk), he could only enforce specific performance against his vendor upon the terms of his entering into a covenant of indemnity; although, if the *vendor* were enforcing specific performance, he could not insist upon such a covenant in the absence of any stipulation to that effect in the contract. This decision was followed in *Lukey* v. *Higgs* (*a*), and is still good law, although the form of the covenant for indemnity has recently been modified by the Court of Appeal (*b*). The result of the universal practice of insisting upon covenants for indemnity upon conveyances of the fee simple was to preserve *express* notice of the restrictive covenant on every sale of the property, and the purchaser was entitled to an abstract of recited restrictions even when they occurred in a deed prior to the root of title (*c*). Prior to 1891, however, there was no authority for the proposition that if the purchaser took less than a forty years' title, and none of the abstracted deeds recited the deed containing the restrictions, he was affected with constructive notice of a restriction which he would have ascertained had he insisted upon a full forty years' title. The point was, indeed, suggested by Lord Romilly in *Morland* v. *Cook* (*d*) at a time when sixty years was the recognised period for investigation. The statement in the sixth edition of Dart on Vendors and Purchasers (*e*) that "a purchaser has notice of all deeds relating to and forming part of the full title allowed by law and of their contents," and "cannot relieve himself from the notice by contracting to buy under a shorter title," is not borne out by the cases cited. These cases only show that if a purchaser refrains from *all investigation*, knowledge will be imputed to him which

(*a*) (1855), 24 L. J. Ch. 495.
(*b*) *Re Poole and Clarke*, [1904] 2 Ch. 173.
(*c*) *Phillips* v. *Caldcleugh* (1868), L. R. 4 Q. B. 159.
(*d*) L. R. 6 Eq. at p. 266.
(*e*) Page 980.

he would have had if he had made a reasonable and fair investigation of the title (*f*).

It is submitted that what is a reasonable investigation should depend on the circumstances of each case, and that no hard and fast line can be drawn (*g*). Thus, in *Nottingham Patent Brick and Tile Co.* v. *Butler* (*h*), property was conveyed to Barnett by a deed dated 4th September, 1866, containing restrictive covenants. Barnett conveyed the property to Windley in 1868 by a deed which contained no reference to the restrictions, and it appears that, in 1877, the defendant Butler purchased from Windley, taking the deed of 1868 as the root of title. Although Butler accepted a nine years' title, he claimed to be a purchaser for value without notice. Lord Esher said (*i*) that the question whether Butler purchased without notice was "a question of fact and a matter of evidence." Lord Lindley said (*k*): "Upon the evidence as it now stands, it seems to me that Butler bought without notice of the covenants. But suppose litigation ensued between some other persons and the present plaintiffs (*i.e.*, the purchasers) after the property had been conveyed to them, we cannot tell what evidence might be forthcoming, and it is quite possible, upon a *re-investigation of the facts*, it might appear that Butler had notice of the covenants." Lopes, L. J., said (*l*) the question whether Butler "did or did not buy without notice of the restrictive covenants is a matter of evidence."

Now, if it was the duty of Butler in 1877, when he purchased, to require a forty years' title, he could not have

(*f*) *Peto* v. *Hammond* (1861), 30 Beav. 495, at p. 508; *Gainsborough* v. *Watcombe Terra Cotta Co.* (1885), 54 L. J. Ch. 991.

(*g*) In *Taylor* v. *London and County Bank*, [1901] 2 Ch. at p. 259, Stirling, L. J., held that in the case of a simple title the transferee of a mortgage might without negligence *dispense with an abstract*.

(*h*) 16 Q. B. D. 778.

(*i*) *Ibid.* p. 787.

(*k*) *Ibid.* p. 789.

(*l*) *Ibid.* p. 790.

escaped notice of the conveyance to Barnett in 1866, and the judgments of the Lords Justices seem entirely beside the mark. In that case it would not be a question of evidence or disputed fact, but of law.

In *Cox and Neve's Contract* (*m*), however, Mr. Justice North laid down definitely the proposition that "if a purchaser chooses to take property with a thirty-eight years' title, without going any further back, he has constructive notice of that which he would actually have known if he had required a forty years' title to be shown, and had investigated the title during that period" (*n*). Now, sect. 1 of the Vendor and Purchaser Act, 1874, substituted forty years as the period of commencement of title which a purchaser may require in the place of sixty years, "subject to any stipulation to the contrary in the contract." But there seems no reason why, if, notwithstanding sect. 2 of that Act, a lessee is still considered imprudent who does not stipulate for the title of his lessor (*o*), a purchaser who does not stipulate for a sixty years' title should not be equally guilty of negligence. The old rule of conveyancers that the title should be carried back sixty years was said to be based on the duration of human life (*p*), and was not affected by sect. 17 of the Statute of Limitations (*q*), which made forty years the utmost allowance for disabilities. In the year 1874 the Legislature reduced the allowance for disabilities to thirty years (*r*); but in the Vendor and Purchaser Act, passed subsequently *in the same year*, the period of investigation was reduced, as we have seen, to forty years. This period would therefore appear to be purely an arbitrary one, and the obligation to investigate for forty

(*m*) [1891] 2 Ch. 109.

(*n*) *Ibid.* at p. 118.

(*o*) *Imray* v. *Oakshette*, [1897] 2 Q. B. 218.

(*p*) *Cooper* v. *Emery* (1844), 1 Ph. at p. 389.

(*q*) 3 & 4 Will. 4, c. 27. After this statute was passed it was "suggested by a high authority" that fifty years should be substituted for sixty.

(*r*) 37 & 38 Vict. c. 57, s. 5.

years can only be supported on the ground that this is the usual title, and that it is the duty of the purchaser "to require the usual title, whatever the usual title may be" (*s*).

Although it seems to be a fallacy to assume at the present day that forty years is still the usual title, the *dictum* of North, J., has been accepted in a recent case by Farwell, J. (*t*), and by all the judges in the Court of Appeal (*u*).

It is now therefore established that a purchaser has constructive notice of any restrictive covenant which would have come to his knowledge had he required a full forty years' title.

Moreover, even when the deed containing restrictive covenants does not form part of the chain of title, a purchaser who receives notice of the deed is affected, although the copy furnished to him is an inaccurate copy, for the rule applies that notice of the deed is notice of its contents (*x*).

Registered Titles.

It has yet to be decided how far this rule as to constructive notice is affected by the registration of titles under the Land Transfer Acts. Under the provisions of the Land Transfer Act, 1875, all charges, rights, and liabilities affecting land are divided into two classes, viz.: (1) incumbrances which require registration, and (2) liabilities, rights, and interests which are "not to be deemed incumbrances within the meaning of the Act," and are therefore exempt from registration. Under sect. 30 the transferee of land registered with an absolute title acquires an estate in fee simple free from all estates and interests whatsoever other than (1) incumbrances (if

(*s*) *Patman* v. *Harland*, 17 C. D. at p. 356.
(*t*) *Nisbet and Potts' Contract*, [1905] 1 Ch. at p. 400.
(*u*) [1906] 1 Ch. at pp. 404, 408, 411.
(*x*) *Hooper* v. *Bromet* (1903), 89 L. T. 37.

any) *entered on the register*, and (2) the second class above mentioned, viz., liabilities, rights and interests which are exempt from registration.

Now it has been said by a high authority, that the burden of a restrictive covenant "is often called an incumbrance, but not with propriety" (*y*). "It is a burden in the nature of an incumbrance." One would therefore expect to find this equitable burden included in class 2 as a liability which is not to be deemed an incumbrance. But if we look at sect 18, which contains an exhaustive list of rights and liabilities which are not to be deemed incumbrances, classified under seven headings, the burden of a restrictive covenant is not included. The third heading includes "rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water, and *other easements*"; but it is presumed that, although "other easements" include negative easements, such as an easement of light as well as affirmative easements, the expression does not extend to a restrictive covenant which is not strictly an easement (*z*).

There are, therefore, only two possible constructions to be placed on the Acts, viz., either that a restrictive covenant is not an "interest" within the meaning of sect. 30, or that when registered it is an "incumbrance," for it seems perfectly clear that a restrictive covenant is not an unregistered dealing with land which can be protected by notice under sect. 49 (*a*). As to the first point, it has been laid down by Lord Halsbury that the right of a covenantee in respect of a restrictive covenant is not an "interest in the property in a legal sense"; and Fry, L. J., in the same case, intimated that the right was not an

(*y*) *Cato* v. *Thompson* (1882), 9 Q. B. D. at p. 618. But Kay, J., in a later case, said: "These covenants were *existing incumbrances*": *Ellis* v. *Rogers* (1884), 29 C. D. at p. 666.

(*z*) See *Kirby* v. *School Board of Harrogate*, [1896] 1 Ch. at p. 449.

(*a*) There are only six classes of Notice which can be placed on the register. See Brickdale & Sheldon, p. 120.

interest in the land (*b*). The argument in a recent case (*c*) that a restrictive covenant was not "an interest in the land, but merely a right personal to the covenantee," cannot be wholly accepted; but the first part of the proposition is probably correct. A negative right over land is not, it is submitted, an interest in land, and it has never been held, in the case of an easement, that the right of the dominant owner is an "interest" in the servient tenement (*d*). It is submitted that the Land Transfer Acts did not intend to treat a restrictive covenant as an interest in land. There is no provision to be found in the Acts that a restrictive covenant, when registered, is to be deemed to be an incumbrance. This is all the more remarkable, because sect. 52 expressly provides that an estate in dower or by the curtesy of which notice is registered, "shall be an incumbrance appearing in the register"; and sect. 50, which deals with the registration of notices of leases exceeding twenty-one years, enacts that every registered proprietor shall be deemed to be affected with notice of such lease "as being an incumbrance."

Sect. 84 apparently assumes that a restriction against building either runs with the land or is "capable of being legally annexed to land," and provides that upon registration thereof "the first proprietor and every transferee and every other person deriving title from him shall be deemed to be affected with notice of such condition." If "legally" means at law as opposed to in equity, it is strange that it was thought necessary to insert the pro-

(*b*) *Guardians of Tendring Union* v. *Dowton*, [1891] 3 Ch. 265, at pp. 268, 269.

(*c*) *Long Eaton Recreation Grounds* v. *Midland Railway*, [1902] 2 K. B. at p. 576.

(*d*) The judgment of Montague Smith in *Eagle* v. *Charing Cross Rail. Co.*, L. R. 2 C. P. at p. 651, seems to suggest this theory. See also *Hewlins* v. *Shippam*, 5 B. & C. at pp. 229, 233, where Bayley, J., said, "A right of way, *where it does not create an interest in the land*, is an incorporeal right." "If the thing claimed is to be considered as an easement, *not an interest in the land*, such a right cannot be created without deed." Farwell, L. J., has, however, laid down that "the person entitled to the benefit of the restrictive negative covenant over Blackacre has an *equitable interest* in Blackacre": [1905] 1 Ch. at p. 398.

vision as to notice, for the plea of purchaser for value without notice is "only a bar to an equitable and not to a legal claim" (*e*).

In order, apparently, to remove any doubt as to the meaning of "legally annexed to land," the Act of 1897 provided that the section should apply to any restrictive condition "capable of affecting assigns by way of notice," but if it was intended that a registered restriction should be an incumbrance entered on the register within the meaning of sect. 30 the question of notice would be immaterial. On the whole, it is conceived that a transferee is bound by an unregistered restriction of which he has *express* notice, but that in the case of an absolute title the transferee is not affected with *constructive* notice of any unregistered restriction. It is also submitted that for the purpose of the plea of purchaser for value without notice the fee simple conferred by sect. 30 is equivalent to the legal estate.

Conveyances under the Lands Clauses Acts.

Sect. 81 of the Lands Clauses Consolidation Act, 1845 (*f*), provides that a conveyance under the provisions of the Act shall bar and destroy all "estates, rights, titles, remainders, reversions, limitations, trusts, and *interests whatsoever* of and in the lands comprised in such conveyances which shall have been purchased or compensated for by the consideration therein mentioned." It is clear that the purchase-money paid for the land does not include compensation to the owner of a dominant tenement in respect of an easement or restrictive covenant, for it is not necessary to give any notice to treat to such owners. The compensation clauses and not the purchase clauses of the Act apply to such a case (*g*). *Primâ facie*, therefore, a

(*e*) *Williams* v. *Lambe* (1790), 3 B. C. C. 263; *Collins* v. *Archer* (1830), 1 Russ. & M. 284.

(*f*) 8 & 9 Vict. c. 18.

(*g*) *Clark* v. *School Board for London*, 9 Ch. 120; *Duke of Bedford* v. *Dawson* (1875), 20 Eq. 353.

purchase under compulsory powers does not put an end to the restriction (*h*), and if the land is subsequently sold by the promoters as superfluous land not required for their undertaking, the burden of the restriction revives even where the conveyance to the promoters was not made subject to the covenant (*i*).

On the other hand, if a school board, railway company, or other body acting in pursuance of their statutory powers interfere with an easement, or commit a breach of a restrictive covenant, it is clear that no action for an injunction can be brought, and this is so whether the land is acquired compulsorily or by agreement (*k*).

The remedy of the owner of a dominant tenement or covenantee who is injuriously affected is to apply for compensation under sect. 68.

He must wait until the injury is done and then get compensation.

Sect. 68 provides that "if any party shall be entitled to any compensation in respect of any lands or any interest therein which shall have been *injuriously affected* by the execution of the works," he can obtain compensation from the promoters as therein mentioned.

In *Eagle* v. *Charing Cross Rail. Co.* (*l*) it was held that where there was an interference with a negative easement such as a right to light, the dominant tenement was "land injuriously affected" within the meaning of sect. 68, because the negative easement adds to the monetary value of the dominant tenement.

The principle which applies to an easement applies equally to the right which is created by a restrictive covenant (*m*). The value of the land to which the benefit of

(*h*) *Ellis* v. *Rogers*, 29 C. D. at pp. 666, 670.

(*i*) *Bird* v. *Eggleton*, 29 C. D. 1012.

(*k*) *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437.

(*l*) L. R. 2 C. P. 638.

(*m*) Per North, J., in *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. at p. 483; cited by Lord Collins, [1902] 2 K. B. at p. 582.

the restriction is attached is reduced, and therefore the breach of the covenant is "the subject-matter of a claim for injuriously affecting the land for the benefit of which they were entered into" (*n*).

It is presumed that if the covenantee obtains compensation under sect. 68 the restriction is altogether extinguished (*o*).

Ultra Vires.

If a railway company or other public body having statutory power to acquire land for the purpose of its undertaking enters into a restrictive covenant which purports to preclude it from exercising its statutory powers with reference to the land, such a covenant is *ultra vires* and void (*p*). It is not, however, *ultra vires* for such a body, when selling its superfluous land, to exact restrictive covenants from the purchaser (*q*). In the case of the sale of land by a municipal corporation, a restrictive covenant on the part of the corporation with reference to unsold lots is *ultra vires* unless it is sanctioned by the Local Government Board (*r*).

In a recent case it was held that a covenant in an unregistered deed not to use certain land "or suffer the same to be used for any purpose whatever otherwise than as almshouses for the poor" did not offend against the Statutes of Mortmain (*rr*).

Title Paramount.

A person whose title to the land is paramount to that of the original covenantor, is not, of course, bound by the

(*n*) *Long Eaton Recreation Grounds* v. *Midland Railway*, [1902] 2 K. B. 574.

(*o*) *Ellis* v. *Rogers*, 29 C. D. at p. 666.

(*p*) *South Eastern Rail. Co. and Wiffen's Contract*, [1907] 2 Ch. 366.

(*q*) *Higgins and Hitchman's Contract* (1882), 21 C. D. 98.

(*r*) *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. 208.

(*rr*) *Holliwell* v. *Seacombe*, [1906] 2 Ch. 426, *sed quære*.

restriction (*s*). The acquisition of a title to land under the Statute of Limitations is not a paramount title which extinguishes a restrictive covenant affecting the land previously entered into by the owner (*t*); but it is conceived that if the disseisor was already in possession when the covenant was entered into he would not be bound (*u*).

Where a sanitary authority obtains a charge on land under sect. 257 of the Public Health Act, 1875 (*x*), although this charge has priority over other incumbrances on the property, it does not override a restrictive covenant affecting the land, nor can the local authority sell the land freed from the restriction (*y*).

(*s*) *John Brothers* v. *Holmes*, [1900] 1 Ch. at pp. 197, 198.
(*t*) *Nisbet and Potts' Contract*, [1906] 1 Ch. 386.
(*u*) Cf. *Thornton* v. *France*, [1897] 2 Q. B. 143 (the case of a mortgage).
(*x*) 38 & 39 Vict. c. 55.
(*y*) *Guardians of Tendring* v. *Dowton*, [1891] 3 Ch. 265.

CHAPTER V.

ASSIGNMENT OF THE BENEFIT.

The doctrine of *Tulk* v. *Moxhay* relates exclusively to the *burden* of a restrictive covenant, and, with one exception (*a*), has never been applied to the assignment of the benefit. As pointed out in the first chapter, the benefit of practically all contracts was always assignable in equity, and it was not therefore necessary to resort to any special doctrine. Questions with respect to the benefit of covenants of this kind have, however, been decided upon similar principles (*b*), and just as the burden of the covenant runs with the servient tenement in equity, so the benefit may be annexed to the dominant tenement and pass by mere assignment of the land (*c*).

In dealing with the assignment of the benefit, it is necessary to distinguish between that numerous and difficult class of cases where there is a *general scheme* constituted either by a deed of mutual covenant, or by the sale of land in building plots, and the simpler class where no evidence of any general scheme can be found.

It is proposed in the first place to deal with the class where there is no general scheme, and divide this class into three sub-headings: (1) where the covenantee has no adjoining or adjacent property for the benefit whereof the covenant is entered into; (2) where the covenantee has

(*a*) *Clegg* v. *Hands*, 44 C. D. at p. 519. The judgment of Cotton, L. J., on this point seems to be misconceived.

(*b*) *Keates* v. *Lyon*, 4 Ch. at p. 223.

(*c*) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

other property in the neighbourhood, but there is nothing in the conveyance containing the covenant, or in the surrounding circumstances, to indicate to what particular property the covenant is annexed; and (3) where the benefit is in the first instance expressly or by implication annexed to particular land.

Where no Property retained.

It has been said that a vendor may lawfully and reasonably insist upon restrictive covenants, even when the conveyance comprises the whole of the property to which he is entitled at the date of the covenant (*d*). But unless the covenantee has the intention of acquiring property in the neighbourhood (a somewhat improbable case suggested by Selwyn, L. J.), such a covenant must be regarded as a personal covenant, that is, as one obtained by the vendor for some personal purpose or object. It is presumed that such a covenant could be enforced by the original covenantee against the original covenantor upon the principle laid down by Lord Cairns in *Doherty* v. *Allman* (*e*), at any rate, if any possible damage could be shown. It is not, however, legally permissible to the original covenantee to assign the benefit of such a covenant (*f*), and it is clear that such a covenant cannot be enforced by his executor after his decease (*g*).

Benefit not Annexed to any Particular Property.

A vendor who retains land in the neighbourhood may obtain restrictive covenants solely for his own benefit without defining the particular property for the benefit of which the covenant was entered into. In such a case it is presumed that the covenant is not personal or collateral,

(*d*) *Keates* v. *Lyon*, 4 Ch. at p. 227.
(*e*) 3 A. C. at pp. 719, 720.
(*f*) *Formby* v. *Barker*, [1903] 2 Ch. at p. 554.
(*g*) *Ibid.* p. 539.

but the difficulty in identifying the dominant tenement may frequently render it unenforceable. Thus in *Renals* v. *Cowlishaw*, the owners of the Mill Hill estate sold some adjoining property to Shaw, who covenanted with the vendors, "their heirs, executors, administrators, and assigns," not to build upon the land conveyed within a certain distance from a particular road leading to Mill Hill house. The plaintiffs were assignees for value of the Mill Hill estate, and the defendants derived title from Shaw. Lord Justice James in that case said (*h*): "To enable an assign to take the benefit of restrictive covenants there must be something in the deed to *define the property* for the benefit of which they were entered into. Supposing I were now framing the deed afresh I should not have the remotest idea how the covenant ought to be framed, as I cannot tell what the property was which the parties intended to be protected and within what limits." The subsequent conduct of the vendor in dealing with the property retained by him cannot, it is presumed, be regarded for the purpose of construing the covenant so as to identify the dominant tenement, but it would seem that the vendor on an assignment of the land retained by him may expressly or by necessary implication annex to it the benefit of the covenant. Thus in *Renals* v. *Cowlishaw*, Hall, V.-C., said: "A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by others when his vendor has *contracted with him that he shall be the assign of it*, that is, have the benefit of the covenant" (*i*). Again, in *Rogers* v. *Hosegood* the judgment of the Court of Appeal contains the following passage (*k*): "When, as in *Renals* v. *Cowlishaw*, there is no indication in the original conveyance or in the circumstances attending it that the burden of the restrictive

(*h*) 11 C. D. at pp. 868, 869.
(*i*) 9 C. D. at p. 129.
(*k*) [1900] 2 Ch. at p. 408.

covenant is imposed for the benefit of the land reserved or *any particular part of it*, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold in order to see whether a benefit *not originally annexed to it has become annexed to it on the sale.*"

Curiously enough, there is only one recorded instance of the benefit of the covenant being subsequently annexed in this manner, viz., the case of *Nalder and Collyer's Brewery Co.* v. *Harman*, decided by Kekewich, J., in the year 1900 (*l*).

In that case Drummond, the defendant's predecessor in title, entered into a restrictive covenant with his vendors which did not form part of any general building scheme. The vendors afterwards sold the adjoining property under a building scheme, and by indicating on the plan the plot already sold to Drummond by inference passed to the purchasers the benefit of Drummond's covenant. In the other cases in which there has either been an express (*m*) or implied (*n*) assignment of the benefit, the Court has found that there was in the first instance a general building scheme affecting the property. If the benefit is not annexed to particular property in the first instance, the fact that a subsequent purchaser of land retained by the vendor did not, when he purchased, know of the existence of the restriction seems to be conclusive evidence that the benefit was not annexed to the land which was assigned to him (*o*).

In some cases an intention is shown to annex the benefit of the covenant to a particular estate named, but not otherwise defined, as, for instance, the Calverley estate in *Kelsey* v. *Dodd* (*p*); the Branksome estate in *Everett* v.

(*l*) 82 L. T. 594.

(*m*) *Manners* v. *Johnson* (1875), 1 C. D. 673 (assignment to the plaintiff Barker).

(*n*) *Spicer* v. *Martin* (1888), 14 A. C. 12.

(*o*) *Master* v. *Hansard* (1876), 4 C. D. at p. 722; *Rogers* v. *Hosegood*, [1900] 2 Ch. at p. 408.

(*p*) (1881), 52 L. J. Ch. 34.

Remington (*q*); and the Earlsfield estate in *Spencer* v. *Bailey* (*r*).

In such a case the words are construed as meaning the estate in question "in its popular and broad sense," and not every lessee or purchaser of a small plot.

"The Calverley estate must mean that estate which remains unsold and belonged to the vendors, and does not include portions of the estate which had been sold off and which, though at the time they were sold were properly described as forming part of the Calverley estate, could not, I think, be properly so described after they were sold" (*s*).

In *Spencer* v. *Bailey* (*t*) the plaintiff exacted a restrictive covenant from his lessee which was expressed to be for the benefit of the Earlsfield estate. The plaintiff subsequently sold other portions of the estate and entered into covenants with the purchasers with reference (*inter alia*) to the user of the demised premises. It was held by Romer, J., that the plaintiff, even after parting with the reversion of the lease, could still bring an action on the restrictive covenant, on the ground that his liability to subsequent purchasers gave him an interest in enforcing the restriction.

When the Benefit is expressly annexed to particular land.

Different considerations apply when the benefit is in the first instance annexed to particular property so as to inhere in every part thereof. Thus, in *Mann* v. *Stephens* (*u*), the owner of three houses and of an adjoining piece of land sold one of the houses, and at the same time covenanted with the purchaser that the piece of land should for ever thereafter be used in a particular way, and that no building except a private house or ornamental cottage should be erected thereon. In that case, therefore,

(*q*) [1892] 3 Ch. 148.
(*r*) (1893), 69 L. T. 179.
(*s*) 52 L. J. Ch. at p. 36.
(*t*) 69 L. T. 179.
(*u*) 15 Sim. 377. See also *McLean* v. *M'Kay*, L. R. 5 P. C. 327.

the restriction respecting the user of the land was plainly intended to benefit the owner of the house for the time being, and it was held that the plaintiff, in whom the house became ultimately vested, was entitled to enforce the restriction. Again, in *Nicoll* v. *Fenning* (*x*), part of a piece of land called Great Star Field was sold to the predecessor of Nicoll for the purpose of erecting a public-house thereon, and a restrictive covenant was entered into by the vendors restricting the user of the residue of Great Star Field as a public-house. Here, again, the benefit was by implication annexed to the land sold. These were cases of covenants by vendors, but the same result follows when the covenant is by the purchaser, if it is clearly expressed that the covenant shall enure to the benefit of adjoining or adjacent property belonging to the covenantee (*y*). When the benefit has been once clearly annexed to one piece of land it passes by assignment of that land, and may be said to run with it in contemplation as well of equity as of law without proof of special bargain or representation on the assignment, and even although the assignee is not at the time of his purchase aware of the existence of the restriction (*z*). At law the benefit of a covenant will only run with the legal estate, and the assignees of an equity of redemption cannot (apart from estoppel) maintain an action on the covenants (*a*). But the benefit of a restrictive covenant may be annexed to land of which the covenantees are only mortgagors in possession, and when so annexed will pass with the equity of redemption, for the mortgagors are in contemplation of equity the owners of the land.

When the benefit of a restrictive covenant has once been annexed to land, it is conceived that any person who claims

(*x*) (1881), 19 C. D. 258.

(*y*) Cf. *Duke of Devonshire* v. *Brookshaw* (1899), 81 L. T. 83, where the benefit was annexed to Compton House.

(*z*) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

(*a*) *Onward Building Society* v. *Smithson*, [1893] 1 Ch. at p. 12.

under the original covenantee and is entitled in possession, has the right to enforce the covenant. Thus not only has a mortgagor in possession of the dominant tenement the right to bring an action on the covenant without joining his mortgagee (*b*), but a lessee for years is an assign, and can enforce the covenant (*c*).

Can the Benefit be annexed to an Incorporeal Hereditament?

In Manchester, Bath, and other places in the North and West of England, it is customary on the sale of land to reserve rent-charges to the vendor in lieu of a payment in a lump sum, such rent-charges being commonly though inaccurately described as "chief-rents" or "ground-rents." In order to uphold the vendor's security, it is usual for the purchaser to enter into covenants with the vendor, both affirmative and negative, *e.g.*, to keep the premises in repair and not to carry on offensive trades upon them. The question has not been satisfactorily decided whether the benefit of such covenants can be annexed to the rent-charge. The decisions in *Milnes* v. *Branch* (*d*) and *Brewster* v. *Kidgill* (*e*), and the *dicta* of Lord Lindley and Fry, L. J., in two later cases (*f*), seem almost conclusive that the benefit of an affirmative covenant cannot run with the rent-charge so as to enable the assignee of the rent-charge to sue the original covenantor. It does not, however, necessarily follow that the benefit of a restrictive covenant cannot be annexed to a rent-charge, that is to say to an incorporeal as well as to a corporeal hereditament. There is no decision directly in point, but in *Western* v. *Macdermott* (*g*) it was held that the owner for the time being of

(*b*) *Fairclough* v. *Marshall*, 4 Ex. D. 37.

(*c*) *Tulte* v. *Gosling* (1879), 11 C. D. 273.

(*d*) (1816), 5 M. & S. 411.

(*e*) (1697), 12 Mod. 166.

(*f*) *Heywood* v. *Brunswick Building Society*, 8 Q. B. D. at p. 410; *Austerberry* v. *Corporation of Oldham*, 29 C. D. at p. 785.

(*g*) L. R. 1 Eq. at p. 506.

the rent-charge issuing out of the land had no power to release the restriction. In that case, however, there was a general building scheme.

Merger.

Upon the analogy of an easement it is conceived that the benefit of a restrictive covenant would be merged and extinguished by unity of title and possession, if the dominant and servient tenements pass into the same hands (*h*). But the mere fact that a lessee who, against other lessees of a certain property, is entitled to the benefit of a general scheme, surrenders his lease and takes a fresh lease of the property, would not deprive him of the benefit of the restriction (*i*). Nor does the fact that the lease held by the covenantee when the covenant was entered into has merged in the reversion, extinguish his right to enforce the covenant (*k*).

Sub-sales.

If A., the owner of part of an estate which is subject to restrictive covenants, sells or mortgages to a third party, B., and the conveyance is not expressed to be subject to the restriction, it is clear that the grantor cannot derogate from his own grant. It therefore follows that, although the other owners of parts of the estate can enforce the restriction against B., A. himself, whether or not he still retains property forming part of the estate, cannot set up the restrictive covenant against B. and those who derive title through him (*l*).

The same result follows if A. exacts fresh restrictive covenants from B. on the sale to him, of a different character to the old restrictions.

(*h*) *Keates* v. *Lyon*, 4 Ch. 218 ; *Schreiber* v. *Creed* (1839), 10 Sim. 9.
(*i*) *Russell* v. *Watts* (1883), 10 A. C. 590.
(*k*) *Craig* v. *Greer* (1899), 1 I. R. 258.
(*l*) *King* v. *Dickeson* (1889), 40 C. D. 596.

In that case A. can only enforce the substituted restrictions, for the effect of the conveyance is that, as between A. and B., B. is to be at liberty to deal with the property purchased by him in any way he likes, provided that he observes the covenants into which he has entered with A. (*m*).

(*m*) *Elliston* v. *Reacher*, [1908] 2 Ch. at pp. 393—395.

CHAPTER VI.

DEEDS OF MUTUAL COVENANT.

When there is a general building scheme under which an estate is sold in lots to various purchasers, the inference is that all the purchasers intended to contract one with another as they purchased to abide by the various stipulations or covenants which are applicable to the whole estate. Where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by, and should as against the others *have the benefit of* the covenants entered into by each of the purchasers, the benefit of the covenant enures to the assign of each purchaser, in other words, runs with the land (*a*). Where, therefore, the Court can find a general scheme, that is to say, an intention that the whole estate is to be governed by one general law, the covenants are enforceable by the several purchasers *inter se*, and the benefit is annexed to the land.

The earliest cases with reference to General Schemes arose out of Deeds of Mutual Covenant, which were sometimes entered into during the first half of the nineteenth century in residential neighbourhoods, such as Cheltenham, Ramsgate, and Tunbridge Wells. Lord Justice Farwell has spoken of these decisions as to deeds of mutual covenant as "cases where there is no general scheme, but various persons enter into similar covenants with reference to lands that lie adjacent to one another" (*b*). It is true

(*a*) *Renals* v. *Cowlishaw*, 9 C. D. at p. 128.
(*b*) *Rogers* v. *Hosegood*, [1900] 2 Ch. at p. 397.

that most if not all these decisions might be supported, quite apart from the general scheme doctrine, on the ground that by the terms of the deed the benefit of the several covenants was clearly annexed to particular land, or that the original covenantees were trustees of the benefit for all subsequent and contemporaneous purchasers (*c*). It is, however, submitted that in each of the reported cases a general scheme is clearly embodied in the deed of mutual covenant, and it was out of these decisions that the general scheme doctrine was first evolved (*d*).

Form of Deed of Mutual Covenant.

Deeds of mutual covenant were generally entered into by the owner of an estate laid out for building and expressed to be made between the owner of the one part and two or three named purchasers and the several persons who should at any time execute the indenture of the other part. The intention, of course, was that each person who became a purchaser of part of the estate should execute the indenture just in the same way as at the present day a deed of arrangement is subsequently executed by creditors who accede to it. This subsequent execution was of importance because, prior to the year 1844 (*e*), a person who was not a party to an indenture could not claim a benefit under it.

Decision in Whatman *v.* Gibson.

In *Whatman* v. *Gibson* (*f*) one Fleming, the owner of the site of Nelson's Crescent at Ramsgate, entered into a deed of covenant of this character, which recited that the

(*c*) As to this view of trusteeship of the covenantees, see *Schreiber* v. *Creed*, 10 Sim. at p. 33; *Eastwood* v. *Lever*, 4 De G. J. & S. at p. 126; *Peek* v. *Matthews* (1867), 3 Eq. at p. 518.

(*d*) See *Renals* v. *Cowlishaw*, 11 C. D. at p. 867, *dicta* of Baggallay, L. J.

(*e*) 7 & 8 Vict. c. 76, s. 11; re-enacted by 8 & 9 Vict. c. 106, s. 5.

(*f*) 9 Sim. 196.

land had been laid out and was intended to be dealt with in a particular manner, and declared that it should be a general and indispensable condition of the sale of all or any part of the land that the several proprietors for the time being should observe and abide by the several stipulations and restrictions therein contained, and that Fleming himself would at all times observe the like restrictions and stipulations. Then followed a number of restrictive covenants, one of which prohibited the exercise of the trade of an innkeeper. This deed was executed in the year 1799, and next year Fleming sold No. 6, Nelson Crescent to Cull, the plaintiff's predecessor in title, the conveyance reciting that Cull had executed the deed of covenant. In 1802 Fleming sold No. 7, Nelson Crescent to Austin, the defendant's predecessor in title, and in this case also the conveyance recited that Austin had executed the deed of covenant, but it does not appear to have been clearly ascertained whether either Cull or Austin did in fact execute the deed. Vice-Chancellor Shadwell seems at first to have been impressed with the difficulty that "Fleming contained in himself both the future covenantors and the future covenantees" (*g*). Nor does it appear from his judgment how he got over this difficulty. A man cannot contract with himself, and unless Cull and Austin executed the deed of covenant, the deed can only have been material as evidence of a general scheme subject to which the property was sold (*h*). The judgment lays stress on the existence of this general scheme for the mutual advantage of the purchasers, but the Vice-Chancellor only deals with the *burden* of the covenant and not with the *benefit*, although in a subsequent case he held that the plaintiff, in order to succeed, must make out either that he is an assignee of the

(*g*) 9 Sim. at p. 204.

(*h*) V.-C. Page Wood says of this case: "Each party there was an assign under those *who were parties to the original covenant.*" See *Child* v. *Douglas* (1854), Kay, at p. 571.

benefit of the covenant or a *cestui que trust* under the original covenantee (*i*). It is submitted that this decision can only be supported on the ground that, whether or not Cull executed the deed of covenant, the conveyance to him implied reciprocal covenants by Cull and Fleming to observe the stipulations of the deed.

Decision in Schreiber *v.* Creed.

In *Schreiber* v. *Creed* a similar deed of mutual covenant was executed by Pitt, the owner of the Pittville estate at Cheltenham, in the year 1827, but in this deed Pitt reserved to himself the right to vary the scheme. Pitt in 1833 agreed to sell (*inter alia*) lots 3, 4 and 5 to Stokes subject to the stipulations and restrictions contained in the deed of 1827, and Stokes covenanted that the houses on lots 4 and 5 should stand back 25 feet from the west boundary (*k*).

In pursuance of this contract of sale, Roden House (lot 3) was conveyed to Stokes, and subsequently sold by him to the plaintiff, but before the sale to the plaintiff Pitt and Stokes verbally (*l*) rescinded the contract, as regards lots 4 and 5, which were afterwards sold by Pitt to the defendant. The contention of the plaintiff was that he was assign of the benefit of the covenant contained in the agreement of 1833 (*m*), but, apart from the fact that there had been a relinquishment and abandonment by Stokes of this agreement (*n*), it is difficult to see how the assignee of Stokes, the covenantor, could enforce the covenants against the covenantee. A more reasonable contention would appear to be that the conveyance of Roden House to Stokes having been made subject to the

(*i*) *Schreiber* v. *Creed*, 10 Sim. at p. 40.
(*k*) *Ibid.* p. 17.
(*l*) *Ibid.* p. 25.
(*m*) *Ibid.* p. 32.
(*n*) *Ibid.* pp. 32, 33.

general scheme contained in the deed of 1827, impliedly gave him the benefit of this scheme (*nn*); but the power of variation reserved to Pitt was considered by the Vice-Chancellor a sufficient answer to this argument (*o*).

Later Decisions.

The next decision, as to deeds of mutual covenant, is a much simpler case. In *Coles* v. *Sims* (*p*), the deed of covenant was entered into between Shewell, the owner of a piece of land called Cambray, at Cheltenham, with Morris, a purchaser of two lots. The defendant claimed under a subsequent purchaser from Shewell of a portion of Cambray, and the plaintiff claimed through Morris. In this case the benefit of Shewell's covenant being clearly annexed to Morris's land, there was no difficulty in holding that the plaintiff, as assign of Morris, was entitled to enforce the restriction. In *Kilbey* v. *Haviland* (*q*), *Gaskin* v. *Balls* (*r*), and *London and Suburban Land Co.* v. *Field* (*s*), which were cases arising out of deeds of mutual covenant, both plaintiffs and defendants had either themselves executed the deed or derived their title from parties to the deed. In *Hooper* v. *Bromet* (*t*) it was assumed that the defendant was bound by and the plaintiff entitled to the benefit of a deed of this character, but it does not appear whether the parties derived title under the deed. In *Mackenzie* v. *Childers* (*u*) there was a deed of covenant *inter partes* (inaccurately described as a "deed poll"), but there were no express covenants by the vendors, although they executed the deed. Kay, J., inferred a covenant by the vendors from the recitals, but held that even if the

(*nn*) Cf. *Elliston v. Reacher*, [1908] 2 Ch. 665.
(*o*) 10 Sim. pp. 33—39.
(*p*) (1854), 23 L. J. Ch. 258.
(*q*) (1871), 19 W. R. 698.
(*r*) (1879), 13 C. D. 324.
(*s*) (1881), 16 C. D. 645.
(*t*) (1903), 89 L. T. 37.
(*u*) (1889), 43 C. D. 265.

vendors were not bound by covenant they were bound by an implied contract restricting their dealings with the land, in violation of the building scheme. In that case not only had the plaintiffs executed the deed of covenant, but they had bought subject to conditions referring to the deed, and containing a clear representation of the existence of a general scheme. If a conveyance is made subject to stipulations contained in a deed of mutual covenant, it is immaterial that the deed referred to has not in fact been executed. If it can be identified its non-execution makes no difference to the question of liability so far as equitable rights are concerned (*uu*).

Although, however, it is clear that any person claiming under a deed of mutual covenant is entitled in equity to the benefit of it, it does not follow that he is entitled to enforce the covenants by an action for damages at law. This point came before Jessel, M. R., in *Kelsey* v. *Dods* (*v*), and he appears to have considered that subsequent purchasers were "non-existing parties" at the date of the deed, and could not sue the parties to it at law. In that case, however, the plaintiffs had not executed the deed, and the deed did not provide for execution by subsequent purchasers, as in the older form of deeds of mutual covenant. The only other case arising out of a deed of mutual covenant is *Tindall* v. *Castle* (*x*), which will be referred to hereafter.

(*uu*) *Elliston* v. *Reacher*, [1908] 2 Ch. 665.

(*v*) 52 L. J. Ch. at pp. 38, 39. It does not appear that the defendant ever executed the deed, so that in any case there was no privity of contract.

(*x*) 62 L. J. Ch. 555.

CHAPTER VII.

MUTUAL COVENANTS IMPLIED IN THE CASE OF BUILDING SCHEMES.

THERE is a *dictum* of Lord Esher (*a*) to the effect that when the whole of a property is sold in lots subject to certain restrictive covenants, it is not necessary that there should be any building scheme in order to imply mutual covenants between the purchasers. It is, however, submitted that the whole theory of these interdependent covenants rests on the assumption of some general scheme either already entered into at an antecedent sale and communicated to the purchasers, or to be derived from the circumstances under which the property is put up for sale and the representations made to the purchasers.

Scheme entered into by Antecedent Sale.

The intention to give the several purchasers the benefit of covenants *inter se* may be inferred from the existence of a scheme entered into already by antecedent sales. Thus in *Western* v. *Macdermott* (*b*), Sir Benet Garard conveyed the site of Brock Street in the city of Bath to Wood in the year 1766, and the conveyance contained covenants by Wood to build according to a plan thereto annexed. On the 16th May, 1767, Wood conveyed No. 9, Brock Street to Freeman, the defendant's predecessor in title, and by this conveyance Freeman entered into certain restrictive covenants as to (*inter alia*) building in the garden at the rear

(*a*) *Nottingham Case*, 16 Q. B. D. at p. 785.
(*b*) 1 Eq. 499 ; 2 Ch. 72.

of the house. A few days later, viz., on the 23rd May, 1767, Wood conveyed No. 10, Brock Street to Rodburn, the plaintiff's predecessor in title, subject to covenants in a precisely similar form (*c*). The plaintiff claimed as assignee of Wood to enforce the covenant in the conveyance to Freeman, the benefit whereof was, by implication from the surrounding circumstances, annexed to the other Brock Street houses (*d*). Lord Romilly, however, was prepared to go much further, and to hold (*e*) that after the conveyance of the 16th May, 1767, Freeman might *è converso* have enforced the restriction against Wood and his assigns.

This seems to be the first enunciation of the building scheme doctrine, the essence of which is that every one of the purchasers is entitled to enforce as against any other those covenants which are presumed to be entered into for his benefit. In *Child* v. *Douglas* (*f*), Vice-Chancellor Page Wood was unable "to come to a conclusion perfectly satisfactory to my own mind what are the rights of parties *inter se*, each of whom has covenanted with the landlord, but who have neither covenanted with each other nor taken any covenant from the landlord to themselves" (*g*). This question really depends upon whether or not there is a general scheme, and a good illustration of this principle is to be found in the decision of the House of Lords in *Spicer* v. *Martin* (*h*). In that case a block of seven houses in Cromwell Gardens was conveyed to Spicer subject to

(*c*) 1 Eq. at p. 503.

(*d*) This implication would only arise if there was a general building scheme (see *Renals* v. *Cowlishaw*, 11 C. D. at p. 867); but it seems doubtful whether the Court was right in finding that any general scheme existed. See *Sheppard* v. *Gilmore* (1887), 57 L. J. Ch. 6.

(*e*) 1 Eq. at p. 507.

(*f*) 2 Jur. N. S. at p. 952.

(*g*) See also *Eastwood* v. *Lever*, 4 D. J. & S. 114, in the year 1863, where the Court considered that the original covenantees were necessary parties to the action.

(*h*) 14 A. C. 12.

restrictive covenants prohibiting any trade or business. Spicer granted leases of the seven houses, each lease containing a similar restriction, and in putting the houses on the market Spicer in effect "invited the public to come in and take a portion of the estate which was bound by one general law." Under these circumstances the House of Lords implied a reciprocal obligation on the part of Spicer "not to authorize the use of part of the estate for a purpose inconsistent with the law by which he professed to bind the whole."

It is, however, submitted that the *dictum* of Lord Romilly above referred to goes too far.

When once the vendor has given to the purchaser the benefit of a restrictive covenant entered into by the vendor on a previous sale, he cannot subsequently get rid of the restriction by obtaining a release from the original covenantee. But unless there is a representation that the property is bound by one general law, a mere statement as to the existence of a prior restriction would not, it is conceived, give the purchaser the benefit of the covenant or preclude the vendor from subsequently obtaining its release. The decision in *Piggott* v. *Stratton* (*i*) must be explained on the ground of fraud and bad faith, and *Leader* v. *Moody* (*k*) on the principle that a man cannot derogate from his own grant. The mere fact that land is conveyed subject to an existing restriction does not, it is conceived, give the purchaser any right to enforce this restriction against his own vendor.

General Scheme inferred from Particulars, Conditions, Plans, &c.

So far we have only dealt with cases in which the property is already subject at the time of sale to a defined scheme of restrictions contained either in a deed of mutual

(*i*) (1859), 1 D. F. & J. 33.
(*k*) 20 Eq. 145.

covenant or in a prior conveyance. But the intention that the covenants shall enure for the benefit of the purchasers *inter se* may also be implied when there is no pre-existing general scheme, but plots of land subject to similar restrictions are put up together as a whole or offered simultaneously to the public. It is a question of fact whether the restrictions are imposed merely for the benefit and protection of the vendor or are meant by him and understood by the buyers to be *for the common advantage* of the several purchasers, and this question of fact is determined not merely by the form of the conveyance, but by extrinsic evidence as to the particulars and conditions of sale, plans exhibited to the purchasers, and statements made at auctions. When a vendor desires to sell the *whole* of his property, the inference is strong that such covenants are for the common benefit of the purchasers (*l*), but this presumption may be rebutted where no printed conditions are circulated among the public, and there is no reference on the plan or any other document to any building scheme as governing the whole estate (*m*).

On the other hand, when the vendor retains part of an estate and does not enter into any corresponding covenant to that which he exacts from the purchasers, this is *primâ facie* evidence that the restrictions are merely for the protection of the vendor (*n*). This presumption may also be rebutted and a covenant by the vendor implied (*o*), but where the sale is by a municipal corporation, with the sanction of the Local Government Board, no such covenant can be implied because it has not been approved by the Board (*p*). Where the Court inferred from the particulars

(*l*) *Nottingham Patent Brick Co.*, 15 Q. B. D. at p. 269.

(*m*) *Tucker* v. *Vowles*, [1893] 1 Ch. 195.

(*n*) *Keates* v. *Lyon*, 4 Ch. at p. 225; *Osborne* v. *Bradley*, [1903] 2 Ch. at p. 454.

(*o*) *Collins* v. *Castle* (1887), 36 C. D. 250, 251; *Hudson* v. *Cripps*, [1896] 1 Ch. 265; *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. at pp. 220, 227, 232.

(*p*) *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. 208.

and conditions an invitation to the public to come in and purchase on the footing that the whole property was to be bound by one law, the vendor was compelled to enter into reciprocal obligations in the conveyance as to the user of unsold lots (*q*), although, prior to this decision, it was not the usual practice so to do. In the case of sales since the year 1893, it is submitted that the presumption arising from the absence of any covenant by the vendor must be much stronger.

On the other hand, if the conditions provide that mutual covenants shall be entered into by the vendor and the purchasers, the inference would seem to be irresistible that the restrictions are for the common advantage (*r*).

Power to vary the Stipulations.

The conditions sometimes expressly reserve a right to the vendor to waive or vary any of the conditions as to any unsold lot, and in such a case the vendor cannot be required to enter into any corresponding covenant (*s*). It has been said that this provision negatives the inference of any general scheme (*t*), but that is stating the case too widely. The presence of a clause permitting the variation of the conditions may be a circumstance to which great weight ought to be given in determining whether or not the intention was that the purchasers should be bound *inter se*, but it is not by any means conclusive (*u*). It is submitted that in most cases it is merely a power which must be exercised *bonâ fide*, and would not justify a radical alteration in the character of the estate (*x*), but if

(*q*) *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342; and cf. *Re Mordy and Cowman* (1884), 51 L. T. 721.

(*r*) *Mackenzie* v. *Childers*, 43 C. D. 265.

(*s*) *Sidney* v. *Clarkson* (1865), 35 Beav. 118.

(*t*) *Osborne* v. *Bradley*, [1903] 2 Ch. at p. 453.

(*u*) *Hooper* v. *Bromet* (1904), 90 L. T. 237. "If there were no general scheme, no dispensing power would be necessary": *Elliston* v. *Reacher*, [1908] 2 Ch. at p. 389; [1908] 2 Ch. 665.

(*x*) *Whitehouse* v. *Hugh*, [1906] 2 Ch. at p. 286.

exercised *bonâ fide* and within proper limits it enables the vendor on a subsequent sale to convey free from the restrictions (*y*). A condition that no purchaser shall be entitled to any covenant from the vendor or from other purchasers in relation to the stipulations does not confer on the vendor any power to vary the restrictions as to unsold lots (*z*).

Exhibition of a Plan.

It seems very doubtful whether the exhibition of a plan can by itself amount to a representation that a particular mode of laying out or dealing with the land must be followed without variation (*a*). Lord Eldon considered that it was perfectly wild to say that the mere exhibition of a plan was sufficient to form a binding contract (*b*), and in *Child* v. *Douglas*, where the land had been laid out for building purposes, and a plan of the land on which a building line was drawn was shown by the vendor to the plaintiff Child, the Court seems to have been so doubtful whether there was any general scheme that eventually an injunction was refused. On the other hand, in *Tindall* v. *Castle* (*c*), North, J., was satisfied that certain plans "were put forward with the intention of representing and holding out to purchasers that that piece of land was appropriated as a lodge, and that it was intended to be used for that purpose."

Successive Sales.

"The whole theory of these interdependent covenants," said Farwell, J., in a recent case, "appears to me to point

(*y*) *Att.-Gen.* v. *Richmond Corporation*, 89 L. T. 700; *Whitehouse* v. *Hugh*, [1906] 1 Ch. 253; 2 Ch. 283.

(*z*) *Rowell* v. *Satchell*, [1903] 2 Ch. 212.

(*a*) *Whitehouse* v. *Hugh*, [1906] 1 Ch. at p. 260; *Osborne* v. *Bradley*, [1903] 2 Ch. 453; *Tucker* v. *Vowles*, [1893] 1 Ch. at p. 208.

(*b*) *Feoffees of Heriot's Hospital* v. *Gibson* (1814), 2 Dow, 301; and see *Squire* v. *Campbell* (1836), 1 M. & C. 459.

(*c*) 62 L. J. Ch. at p. 560; and cf. *Peacock* v. *Penson* (1848), 11 Beav. 355.

to an arrangement made *once for all*, either on a sale by auction, by conditions of sale, stating the covenants, and that other purchasers will enter into similar covenants, and a plan exhibited at the sale, or by a scheme entered into by antecedent sales, the particulars of which are stated to the purchaser, and which are displayed upon a plan drawn upon the purchaser's deed" (*d*). On the other hand, Mr. Justice Kekewich has said that to confine the doctrine to a case "where all the property is put up for sale at once by one auction according to a scheme *once and for all determined* (*e*), never to be departed from, would be to narrow the doctrine far too much." In *Hudson* v. *Cripps* (*f*), North, J., extended the principle relating to building schemes to the letting of residential flats. There a building was let out in flats to private tenants, each lease being in the same form, and containing the same restrictions, but there was no antecedent building scheme, as in *Martin* v. *Spicer*, nor any simultaneous letting to the various tenants. It is submitted that this case goes further than any previous decision, but it was followed by Stirling, J., in *Alexander* v. *Mansions Proprietary, Ltd.* (*g*), in the year 1899, and has since been twice approved and followed in the Court of Appeal (*h*). It may therefore be assumed that in the case of a building let as residential flats, a general scheme may be readily inferred from the surrounding circumstances. Two reported cases arose out of a building scheme affecting the Campden Park Estate at Tunbridge Wells, which was originated by a deed of mutual covenant entered into by Lord Campden in the year 1856, and subsequently developed at various sales, which took place in the years

(*d*) *Osborne* v. *Bradley*, [1903] 2 Ch. at p. 454.
(*e*) *Collins* v. *Castle* (1887), 36 C. D. at p. 251.
(*f*) [1896] 1 Ch. 265.
(*g*) 16 T. L. R. 431.
(*h*) *Gedge* v. *Bartlett*, 17 T. L. R. 43; *Jaeger* v. *Mansions, Ltd.*, 87 L. T. 690.

1875, 1882 and 1883. In *Collins* v. *Castle* (*i*), the question arose whether Collins, who purchased part of the estate at sales by auction, held in 1882 and 1883, could enforce a restrictive covenant entered into by Castle with the trustees of the Campden estate in the year 1885.

The property eventually bought by Castle had been offered for sale at the auctions held in 1882 and 1883, and in each case the conditions had prescribed that certain restrictive covenants should be entered into by the purchaser of these lots. The covenant entered into by Castle was the one prescribed by the conditions at the 1883 sale. Mr. Justice Kekewich seems to have considered that it was doubtful whether the vendors were themselves bound by the conditions, and whether they might not, if they had chosen to do so, have sold to Castle free from all restrictions (*k*). Inasmuch, however, as the learned judge held that the conditions were intended for the common benefit of the purchasers, and that "the plaintiffs bought on the faith that the conditions would be observed over the property of the common vendor," it is submitted that the vendors were clearly bound, and that the decision can be supported on this ground. Whether, if the vendor is not himself in any way bound, a purchaser at a prior sale can in any case enforce a covenant entered into at a subsequent sale seems open to question.

The decision of North, J., in *Tindall* v. *Castle* (*l*) arose out of the same building estate. According to the report in the "Weekly Notes," the learned judge appears to have held that the owners of the several parts of the estate were entitled to the benefit of all matters provided by the general scheme of the estate *as improved and added to after their respective purchases*. It appears that Weston, one of the plaintiffs, derived his title from persons who were

(*i*) 36 C. D. 243.
(*k*) 36 C. D. at p. 249.
(*l*) W. N. (1893) 40; 62 L. J. Ch. 555.

parties to the original deed of covenant of 1856, and that part of the property in question was not added to the Campden estate until 1859. But there were other plaintiffs claiming under sales in 1875 and 1882, and it does not appear from the report in the "Law Journal" that North, J., ever held that Weston could enforce the restrictions as to property which was not an original part of the estate.

It is submitted on principle that a purchaser in the case of successive sales can only enforce the restrictions of the building scheme as developed and defined at the date of the sale to him. In *Rowell* v. *Satchell* (*m*), Swinfen Eady, J., held that "a purchaser at any sale can only enforce the stipulations in respect of lots shown as laid out up to that date, and as to which the restrictions are then defined, and that he cannot enforce them in respect of land retained by the vendor as to which no lotting is shown or stipulations published at the date of the sale at which he purchases."

This view is confirmed by a recent judgment of Parker, J., which has been adopted by the Court of Appeal (*mm*). This judgment lays down four essential points which must be established in order that a plaintiff may enforce a restriction on the footing of a general scheme. These four points are (1) that the plaintiff and defendant derive title under a common vendor; (2) that before selling the land to which the plaintiff and defendant are respectively entitled, the vendor laid out his estate or a defined portion thereof (*including the land purchased by the plaintiff and defendant respectively*) for sale in lots, subject to restrictions intended to be imposed on all the lots, and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots sold;

(*m*) [1903] 2 Ch. at p. 218.
(*mm*) *Elliston* v. *Reacher*, [1908] 1 Ch. at p. 381.

(4) that both plaintiff and defendant, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure to the benefit of the other lots included in the general scheme.

When once, however, a vendor has offered property for sale subject to a general scheme and has sold a portion, he has no power to depart from the scheme, and it is of no consequence that the conveyance is not made strictly in accordance with the stipulations (*n*). Consequently, a purchaser is bound by and can enforce the general scheme although his own conveyance contains a departure from it (*o*).

Sub-schemes.

In some cases a purchaser of part of an estate subject to a general scheme resells in lots, subject to a sub-scheme containing stipulations of a different character. In such a case, as has already been pointed out, the vendor who sells subject to the sub-scheme cannot enforce the original scheme against his purchasers. Moreover, the purchasers under the sub-scheme are, as between themselves, governed by the sub-scheme only, and cannot enforce the restrictions of the original scheme (*p*).

(*n*) *Knight* v. *Simmonds*, [1896] 1 Ch. 653 ; 2 Ch. 294.
(*o*) *Rowell* v. *Satchell*, [1903] 2 Ch. at pp. 218, 219.
(*p*) *Knight* v *Simmonds*, [1896] 1 Ch. at p. 661.

CHAPTER VIII.

RESTRICTIVE COVENANTS IN LEASES.

Between the original lessor and the original lessee there is both privity of contract and privity of estate. The burden arising from privity of contract continues after there has ceased to be privity of estate by reason of an assignment; and in this respect the position of the lessor with respect to covenants running with the reversion is precisely similar to the position of the lessee with respect to covenants running with the lease. In neither case is the privity of contract and the liability arising from such privity extinguished by assignment (*a*).

Where, however, there is no privity of contract but only privity of estate, as in the case of an assignee of the lien or reversion, it is necessary to consider whether the covenant runs with the land. If there is privity of estate, and the covenant runs with the land, the covenant is enforceable in precisely the same manner as if there were actual privity of contract (*b*).

It is not proposed to deal at any length with the resolutions in *Spencer's Case*, upon which the law as to covenants running with the land is supposed to be founded. For the purpose of restrictive covenants, the material resolution is the second, viz., that "although the covenant be for him and his assigns, yet, if the thing to be done be

(*a*) *Stuart* v. *Joy*, [1904] 1 K. B. 362. Whether the *benefit* of the covenant is extinguished by assignment is another matter. After the death of a lessor only the reversioner can enforce the lessee's covenants. See *Formby* v. *Barker*, [1903] 2 Ch. at p. 542.

(*b*) *Thursby* v. *Plant*, 1 Wms. Saund. 241 (1824 ed.); p. 277 (1871 ed.).

merely collateral to the land, and doth not *touch or concern* the thing demised in any sort, then the assignee shall not be charged."

Covenants by Lessors.

Restrictive covenants entered into by lessors may, it is conceived, be divided into three classes:—

(1.) Personal covenants by the lessor not to carry on a particular trade within a specified distance of the demised premises. Such a covenant is merely personal, and is not a restrictive covenant affecting land. Subject to the question whether the covenant is in general restraint of trade such a covenant is enforceable where there is privity of contract, but not otherwise (*c*).

(2.) A covenant not to build or not to permit a trade to be carried on upon adjoining premises, which are not at the time of the demise the property of the lessor. It is clear that such an obligation cannot pass at law with the assignment of the reversion (*d*), nor would the benefit pass with the lease (*e*). It is in fact a collateral covenant which cannot run with the land. Whether, if the lessor subsequently acquires the adjoining property, an equitable burden would then be attached to it under the doctrine of *Tulk* v. *Moxhay*, has never been decided.

(3.) A covenant restricting the user of adjoining property belonging to the lessor at the time of the demise. According to the judgment in *Thomas* v. *Hayward*, such a covenant "touches the beneficial occupation of the thing demised and not the thing itself." Cleasby, B. (*f*), cites an instance given in *Spencer's Case*, of covenants which

(*c*) *Jones* v. *Heavens* (1877), 4 C. D. 636; *Hinde* v. *Gray* (1840), 1 Man. & G. 195. If not entered into in connection with the sale of the goodwill of a business, it seems doubtful whether such a covenant would be enforceable.

(*d*) *Davis* v. *Town Properties Investment Corporation*, [1903] 1 Ch. 797.

(*e*) *Thomas* v. *Hayward* (1869), L. R. 4 Exch. 311; approved in *Dewar* v. *Goodman*, [1908] 1 K. B. 104.

(*f*) L. R. 4 Exch. at p. 312.

do not run with the land, viz., "to build a house upon the land of the lessor, which is no parcel of the demise." But this instance is really a covenant by the lessee "and must be understood of a house not touching or concerning the thing demised" (*g*). The enjoyment of the thing demised is clearly increased by such a covenant, and Lord Ellenborough was of opinion that a covenant ran with the land, "if it affected the value of the thing demised" (*h*). Buckley, L. J., in a recent case, expressed the opinion that a covenant to do off the land demised something which will increase the profits to be made on the land demised is a covenant affecting, not the demised lands, but the profits to be derived from the business carried on on the demised land (*i*). Assuming, however, that such a covenant does not run either with the lease or the reversion, it is clear that the benefit is in equity annexed to the thing demised, and that the burden is attached to the adjoining land.

Covenants by Lessees.

The law as to what covenants by lessees run with the land seems to be in a state of inextricable confusion, and one gropes in vain for any principle which can be derived from the various decisions. The covenant, in order to run with the land, must touch and concern the land, but if it is connected with the mode of managing or occupying the thing demised (*k*) or tends to "the support and maintenance" of the thing demised (*l*), it need not necessarily

(*g*) Per Lord Tenterden in *Sampson* v. *Easterby* (1829), 9 B. & C. at p. 516.

(*h*) *Mayor of Congleton* v. *Pattison* (1808), 10 East, at p. 135; and see *Jourdain* v. *Wilson* (1821), 4 B. & Ald. 266—covenant by lessor to supply water to the demised premises.

(*i*) *Dewar* v. *Goodman*, [1908] 1 K. B. at p. 107, affirmed H. L. Dec. 3, 1908.

(*k*) *Bally* v. *Wells* (1769), 3 Serj. Wils. 25; *Vernon* v. *Smith* (1821), 5 B. & Ald. 1; *Vyvyan* v. *Arthur*, 1 B. & C. 410.

(*l*) *Sampson* v. *Easterby*, 9 B. & C. 505.

relate to acts to be done *upon the demised property*. In order, however, to touch and concern the thing demised it must, it would seem, be beneficial to the lessor *quà reversioner*. This, at any rate, was the view of Best, J. "The general principle," he says, "is that if the performance of the covenant be beneficial to the reversioner and *to no other person* his assignee may sue upon it, but if it is beneficial to the lessor *without regard to his continuing owner of the estate* it is a mere collateral covenant upon which the assignee cannot sue" (*m*). "By the term collateral covenants which do not pass to the assignee are meant such as are beneficial to the lessor without regard to his continuing owner of the estate" (*n*). Covenants as to the mode in which the property demised is to be *kept* and *conducted* run with the land, and this category would seem to include "covenants to restrain the exercise of particular trades" on the demised property (*o*). No doubt a covenant not to carry on a noxious or offensive trade, or a covenant not to carry on a public-house in such a way that the licence may be suspended (*p*), is for the benefit of the reversioner as such. But a covenant restricting a particular trade may be for the benefit of the reversioner as owner of some rival business, and in such a case it is beneficial to him without regard to his continuing owner of the demised property.

Tied House Covenants.

This question has frequently arisen in the case of "tied house covenants." In *Purfrey's Case* (*q*), decided in the 16th century, the covenant was that the lessee of a tavern should account monthly to the lessor for the wine which

(*m*) *Vyvyan* v. *Arthur* (1823), 1 B. & C. at p. 417.

(*n*) *Vernon* v. *Smith*, 5 B. & Ald. at p. 11.

(*o*) *Wilkinson* v. *Rogers* (1864), 2 D. J. & S. 62; *Mayor of Congleton* v. *Pattison* (1808), 10 East, at p. 138.

(*p*) *Fleetwood* v. *Hull* (1889), 23 Q. B. D. 35.

(*q*) Moore, 243 (1587).

he sold, and should pay him so much for every tun sold; and the Court held that the covenant was a collateral thing and did not pass to the assignee of the lessor (*r*). There the covenant did not relate to an act to be done on the thing demised, and is therefore very different from the usual tied house covenant. In *Hartly* v. *Pehall* (*s*), in the year 1792, Lord Kenyon would not determine whether a tied house covenant ran with the land. He thought it a question of some nicety. As late as the year 1834 Lord Brougham was not aware of any decision that a covenant in a brewer's lease to take beer only at the lessor's brewery binds the assignee of the lessee (*ss*). The point came before the Court in the year 1830 in the case of *Doe* v. *Reid* (*t*); and Bayly, J., clearly held that the case was covered by the decision in *Mayor of Congleton* v. *Pattison*, where the lessee of a mill covenanted not to hire persons who were not settled in the Parish of Congleton, which was held not to be a covenant running with the land.

Recent decisions, however, show that the question whether a tied house covenant runs with the land depends upon the proper construction of the covenant. There are, in fact, two classes of covenants of this character, viz.: (1) a covenant with the lessor in his dual capacity of owner of the reversion and of a particular business, and (2) a covenant with the lessor *quâ* reversioner without regard to his continuing owner of any particular business. The first class probably runs with the land so long as the reversion and the business are united in the same hands (*u*). The second class runs with the land, and can be enforced by an assignee of the reversion, whether or not he is carrying on the same business, and even although he is not an assignee of that business.

(*r*) *Purfrey's Case*, Moore, 243.
(*s*) 1 Peake, N. P. 178.
(*ss*) *Keppell* v. *Bailey*, 2 M. & K. at p. 545.
(*t*) 10 B. & C. (1830), 849.
(*u*) Cf. *Vyvyan* v. *Arthur*, 1 B. & C. 409.

(1.) If the covenant is to buy the beer *brewed* by the lessor at a particular brewery, it clearly falls within the first class. It can be enforced so long as there is privity of contract; but the benefit does not pass with the reversion unless the business is also assigned. At common law, if the benefit of the covenant did not pass with the reversion, it remained in the original lessor (*x*), and it is therefore submitted that a lessor who had parted with the reversion could still enforce a covenant of this character against the original covenantor, so long as he (the lessor) carried on the same business. It is also submitted that an assignee of the business, to whom the benefit of the covenant had been expressly assigned, might enforce it against the original covenantor, so long as such assignee carried on the same business (*y*). In *Doe* v. *Reid* the covenant was to purchase from the lessors "or their successors in their late or present trade as brewers all porter, ale, and twopenny or amber, or *such of the said liquors respectively as by them should be brewed for sale*, as should be sold or disposed of in or upon the said premises." The actual decision in that case was that the assignees of the reversion could not enforce the covenant because they were not carrying on the same brewery business (*z*).

In *Birmingham Breweries, Ltd.* v. *Jameson* (*a*), the plaintiffs were assignees of the reversion, but were not also assignees of the lessor's business. The covenant by the lessee was to deal exclusively with "the lessor, or his firm of Messrs. Hood & Sons, or his or their successors in business for all beers, &c.," the business in question being The Brewery, Nechells, Birmingham (*b*). "That means,

(*x*) *Bickford* v. *Parson* (1848), 5 C. B. 920.

(*y*) *Manchester Brewery* v. *Coombs*, [1901] 2 Ch. at p. 619; *Tolhurst Case*, [1903] A. C. 414.

(*z*) The plaintiff was assignee of the goodwill, but it was not the same business. Cf. *Kemp* v. *Baerselman*, [1906] 2 K. B. 604; *Roberts* v. *Heaton*, 42 Sol. J. 715.

(*a*) (1898), 78 L. T. 512.

(*b*) *Ibid.* p. 514, per Lord Lindley.

in short, that the tenant will buy exclusively the beer of that firm. I do not say beer necessarily brewed by that firm. Possibly the firm might sell a beer which they did not brew. But the tenant is to deal exclusively with the people who carry on business at The Brewery, Nechells." Then followed a negative covenant, which was a supplement to the other, that the lessee would not sell beers, &c., "other than such as shall have been purchased of the lessor or his firm, or his or their successors in business." "It is perfectly plain," said Lord Lindley, "that the effect of the whole string of clauses is that the tenant is to get his goods of Mr. Hood's firm or their successors in business, *not his successors in the sense of being assignees of the reversioner in the lease.*" The actual decision in this case did not involve the question whether the covenant ran with the land, for the defendant was still willing to buy his beers from Messrs. Hood & Sons, and therefore there was no breach. It is, however, submitted that since, according to Lord Lindley's judgment, the covenant was intended to be beneficial to the lessor as owner of The Brewery, Nechells, "without regard to his continuing owner of the estate," *i.e.*, of the reversion, the covenant did not run with the land after the assignment of the reversion.

(2.) On the other hand the covenant may be so framed as not to restrict the benefit to the persons who carry on a particular brewery, or to persons who themselves make beer. This was the construction put by the Court of Appeal on the covenant in *Clegg* v. *Hands* (*c*), where the lessee covenanted not to sell beer on the demised premises "other than such as shall have been *bonâ fide* purchased from the lessors." Again, in *White* v. *Southend Hotel Co.* (*d*) the covenant was not to sell wine on the demised premises "other than shall have been *bonâ fide supplied by*

(*c*) 44 C. D. 503.
(*d*) [1897] 1 Ch. 767.

or through the lessor." In this case the covenant was held to run with the land, for on the construction of the covenant it was beneficial to the reversioner for the time being without regard to the question whether he was the owner of any particular business.

It is not clear whether the covenant in *Manchester Brewery Co.* v. *Coombs* (*e*) comes within the first or the second class of cases above referred to. In that case the defendant, who was the original lessee, contracted to purchase all beer "of the landlords, trading as Broadbents, Limited, and their successors in business," and that he would not sell beer "other than such as should have been so *bonâ fide* purchased." The plaintiffs were assignees of the reversion, and also of the business, but there was no express assignment of the goodwill, or of the benefit of the contract. The fact that the plaintiffs were "successors in business of Broadbents, Limited, and as such within the very words of the covenant," did not, of course, create privity of contract; but Farwell, J., held that the covenant was "of such a nature as to run with the land" (*f*). The learned judge relied on the fact that there was no reference to any particular brewery business as being carried on by Broadbents. "There is nothing on the face of the agreement to show they were brewers, and even if they were, there is nothing to show that the beer to be taken by the defendant was beer to be brewed by them." This distinguishes the case from *Birmingham Breweries* v. *Jameson*, where the business referred to was by implication defined.

It is clear that the remedies and rights are mutual, so that if a covenant does not run with the land, in the sense that the benefit does not pass with the reversion, the burden does not run with the lease; and if the covenant is collateral the assignee of the lease cannot be sued at law

(*e*) [1901] 2 Ch. 608.
(*f*) *Ibid.* at p. 613.

even by the original lessor. It is, however, presumed that in the case of a restrictive covenant he would be bound by the doctrine of *Tulk* v. *Moxhay*, unless the covenant was personal and collateral.

In *Luker* v. *Dennis* (*g*), a public-house called the "Sutton Arms" was demised to one Crabb by the plaintiffs, Luker & Co., a firm of brewers, and the lease contained a tied house covenant by Crabb with reference to another public-house called the "Milton Arms," which was not part of the thing demised, or the property of the lessors, but was held by Crabb under another lease from another lessor.

The defendant was the assignee from Crabb of the lease of the "Milton Arms," but not of the "Sutton Arms," so that not only was the covenant collateral, but there was no privity, either of contract or estate.

The defendant, however, bought with notice of the restriction, and was held by Fry, J., to be bound under the doctrine of *Tulk* v. *Moxhay*, but, as already pointed out, this decision is inconsistent with the *dictum* of Lord Macnaghten in *Noakes* v. *Rice* (*h*).

Proviso for Re-entry.

A proviso for re-entry in a lease comes into operation on the breach of a negative or restrictive covenant, not merely where it is expressed to take effect on the breach of any covenant to be "performed and *observed*" by the lessee, but also where the word "performed" only is used. There may be non-performance of a negative as well as of a positive covenant (*i*). In certain collocations, however, the word "perform" may be limited by a reference to the text, so as not to apply to a purely negative covenant.

If the plaintiff is the original lessor, it is immaterial for the purpose of enforcing the proviso, whether the covenant

(*g*) 7 C. D. 227.
(*h*) [1902] A. C. at p. 32.
(*i*) *Harman* v. *Ainslie*, [1904] 1 K. B. 698.

is one which runs with the land, or is wholly collateral. "A lessor has the right to make the estate of his lessee conditional, and the assignee of such an estate takes it subject to the condition, and liable to be divested by the breach of it" (*k*). Of course, if it were otherwise, the lessee by assigning could really defeat the lessor's power of re-entry in a case where the covenant is one which does not touch or concern the land. But if the plaintiff is an assignee of the reversion he cannot avail himself of the proviso for re-entry, unless the covenant which has been broken is one which runs with the land (*l*).

Liability of Lessees for Acts of Under-Lessees.

If the original covenantor covenants for the acts of his assigns he continues to be liable after assignment for the acts of his assigns, although it has been held that an assignee who comes in by compulsory purchase under a statute is not an assign within the covenant (*m*). *Primâ facie*, however, the word "assigns" in a lease means assigns of the whole term, and neither the original lessee nor the person in whom the lease is for the time being vested, is liable for the acts of sub-lessees, but it is a question of construction in each case.

In *Toleman* v. *Portbury* (*n*), a lessee covenanted for himself and his assigns that he would not *permit* any sale by auction on the premises. He sublet to a person who did permit such a sale to be held. The majority of the judges were of opinion that the act of the sub-lessee could not be treated as the act of the

(*k*) *Doe* v. *Peck* (1830), 1 B. & Ad. at p. 428; followed by Walton, J., in an unreported case—*Talbot* v. *Blindell*, Nov. 13th, 1905. The *dicta* to the contrary in *Horsey* v. *Steiger*, [1899] 2 Q. B. at pp. 88, 89, are, however, extremely perplexing.

(*l*) *Stevens* v. *Copp* (1868), L. R. 4 Exch. 20. In this respect there is no distinction between a condition and a covenant.

(*m*) *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180.

(*n*) (1870), L. R. 5 Q. B. 288.

lessee. So, in *Wilson* v. *Twamley* (*o*), where the covenant was not to do, or *suffer* to be done, any act on the premises whereby the licence might be forfeited, it was held that the words "involved the doing of some act or some abstention from action by the covenantor himself, or by some person standing in the relation of agent to him." Again, in *Bryant* v. *Hancock* (*p*), where the covenant was not to *wilfully* do or suffer any act to jeopardise a renewal of the licence, the defendant was held not to be liable for the acts of an underlessee.

In all these cases the covenant was qualified in its terms (*q*). But if the covenant is in form absolute that a certain thing shall not be done on the premises, it is immaterial by whom the act is done. In such a case a lessee is liable for breaches committed by an underlessee (*r*), and it is presumed that in this respect there is no difference between the liability of the original lessee and of an assign of the term, provided that the covenant runs with the land, and the breaches are committed while the term is vested in such assign (*s*).

Liability of Underlessee.

An underlessee is not bound at law by any covenant in the head lease, nor can he be made liable for damages in any action at law because there is no privity of estate (*t*). The same principle applies to the benefit, and therefore an underlessee cannot at law claim the benefit of a covenant in the head lease, or sue the lessor thereon (*u*).

(*o*) [1904] 2 K. B. 99.

(*p*) [1898] 1 Q. B. 716.

(*q*) In all these cases the underlessee might have been restrained by injunction: *Teape* v. *Douse*, 92 L. T. 319.

(*r*) *Palethorpe* v. *Home Brewery Co.*, [1906] 2 K. B. 5.

(*s*) *Mumford* v. *Walker*, 71 L. J. K. B. 19; and cf. *Evans* v. *Davis*, 10 C. D. 747.

(*t*) *Hall* v. *Ewin*, 37 C. D. at p. 81.

(*u*) *South of England Dairies* v. *Baker*, [1906] 2 Ch. 631; *supra*, p. 6.

In the case of restrictive covenants which are not personal to the lessee, but impose a burden on the land, an injunction will be granted against an underlessee on the principle of *Tulk* v. *Moxhay* (*x*). But an injunction will not be granted against an underlessee who has not been privy to a breach of the restrictive covenant, merely because he has not brought an action against a tenant holding under him (*y*). The position of an underlessee who is bound in equity by a negative or restrictive covenant contained in the original lease, but of which he had no *actual* notice, is a singularly unfortunate one, and seems to require some statutory relief. The ordinary *express* covenant for quiet enjoyment, which excludes any implied covenant, does not extend to the acts of the head lessor (*z*), and if any covenant at all is implied by the word "let," it has the same limited operation (*a*). Even if the covenant for quiet enjoyment implied (in the absence of express covenant) by the use of the word "demise," is not restricted to the acts of the immediate lessor and those claiming under him, there is the authority of *Dennett* v. *Atherton* (*b*) for the proposition that this covenant does not extend to an interference with the particular mode of enjoyment of the land. This, however, was only a *dictum*, since both in that case and in *Spencer* v. *Marriott* (*c*) there was an *express* covenant.

The *dictum* was dissented from by Buckley, J., in *Tebb* v. *Cave* (*d*), but it seems to be in accordance with the view

(*x*) *Teape* v. *Douse*, 92 L. T. 319. It seems, however, doubtful whether this doctrine applies if the benefit is not annexed to the reversion. See *supra*, p. 22.

(*y*) *Hall* v. *Ewin*, 37 C. D. 74.

(*z*) *Kelly* v. *Rogers*, [1892] 1 Q. B. 910.

(*a*) *Jones* v. *Lavington*, [1903] 1 K. B. 253.

(*b*) L. R. 7 Q. B. 316, at p. 326.

(*c*) (1823), 1 B. & C. 456.

(*d*) [1900] 1 Ch. at p. 647. This decision has been doubted in the Court of Appeal.

of Charles, J. (*e*). The point is not likely to arise, since a lease containing the formal word "demise" almost invariably contains an express covenant for quiet enjoyment. The result, therefore, seems to be that in the absence of fraud an underlessee has no remedy, although the very purpose for which he took the underlease may be defeated by the restriction.

(*e*) *Spurling* v. *Bantoft*, [1891] 2 Q. B. at p. 393.

CHAPTER IX.

CONSTRUCTION OF RESTRICTIVE COVENANTS.

Restrictive covenants must be construed according to the common and ordinary sense and meaning of the words (*a*). It is necessary to look at the *object* and intention of the covenant (*b*), but the Court is very careful not to imply restrictions unless it is satisfied that they were fairly within the contemplation of the contract judging from the terms in which it is expressed (*c*). The plaintiff coming to seek the assistance of the Court must bring his case within the *plain meaning* of the contract which he is seeking to enforce (*d*).

Distinction between Erection and User.

A distinction must be taken between a covenant to erect buildings of a certain character and a covenant which further provides that the buildings, when erected, shall be maintained as of that character. A covenant as to erection does not necessarily imply a restriction as to user. Thus, although a covenant that a messuage shall be adapted for and used as a private residence only prescribes the use of the building as residential flats (*e*), yet where there was merely a covenant that no "*house*" should be erected of less value than 500*l.*, and a limit to the number

(*a*) *Altman* v. *Royal Aquarium Society* (1876), 3 C. D. at p. 231.

(*b*) *Snow* v. *Whitehead* (1884), 53 L. J. Ch. at p. 888.

(*c*) *Holford* v. *Acton Urban Council*, [1898] 2 Ch. 247; *The Warden of Dover* v. *The South Eastern Rail. Co.* (1852), 9 Hare, 489, at pp. 494, 495.

(*d*) *German* v. *Chapman*, 7 C. D. at p. 276.

(*e*) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

of houses, but no express stipulation as to the user of the building, it was held that a building containing several residential flats constituted one house, and was not a breach of the covenant (*f*). Again, where the conditions of sale provided that the purchaser of each lot should erect a shop and dwelling-house of a given minimum value, Stirling, J., said: "There is nothing, as it seems to me, to prevent a person who bought all the lots from erecting in the first instance buildings which were shops and dwelling-houses, and afterwards throwing them into one by alterations of the party-walls between them, or from using the single building so formed otherwise than as a shop or dwelling-house" (*g*). Again, in *Wright* v. *Berry* (*h*), where certain plots were marked as "residential plots," and the conditions provided that "no building of any kind other than a detached or semi-detached house with appropriate offices, &c. to be appurtenant thereto and occupied therewith shall be erected on any plot," the question was whether the defendants who had complied with the structural requirements could occupy the houses otherwise than as private residences. The Court of Appeal held that there was nothing expressly to show that the houses erected on the residential plots were for all time to be used as *private* dwelling-houses, and that such a restriction ought not to be implied. In *Hawes* v. *Scott* (*hh*) the covenant was not to erect "more than two dwelling-houses with suitable stables, coach-house and offices," and the question was whether this was to be construed as meaning "not more dwelling-houses than two" so as to permit the erection of any other kind of building, or as meaning "no buildings other than two dwelling-houses."

The majority of the Court of Appeal took the former view, and refused to restrain the defendant from building

(*f*) *Kimber* v. *Admans*, [1900] 1 Ch. 412.
(*g*) *Holford* v. *Acton Urban Council*, [1898] 2 Ch. at p. 248.
(*h*) (1903), 19 T. L. R. 259.
(*hh*) 40 Sol. J. 373.

a high wall on the land. The decision in *Webb* v. *Fagotti* (*i*) appears at first sight to be an exception to the above-mentioned rule, but in that case the restriction was really against user. The stipulation in question was that no tavern, &c., "or other building for the sale of any spirituous, malt, or exciseable liquor of any kind" should be *built* upon a certain lot. Now the question whether a building is a tavern is not one of the species of building erected but of the use to which it is put, and therefore the Court of Appeal rejected the word "built," and construed the stipulation as meaning that no tavern should be carried on upon the property. In that case the defendant was restrained from converting into a tavern a temperance restaurant erected since the stipulation was entered into. Where the restriction relates to the "*conversion* into a shop" of some existing building, it would seem that the conversion may be effected by user without any structural alteration (*k*).

In the converse case of a covenant against user without a covenant as to erection, it is equally impossible to imply any additional restriction. Thus, in *Worsley* v. *Swann* (*l*), it was held by the Court of Appeal that a person who has covenanted not to use a building for a certain purpose will not be restrained from erecting a building seemingly adapted only for such purpose.

Specific Expressions strictly construed.

On the same principle, viz., that the restriction must be strictly construed, it has been held that a covenant not to let for the purpose of a particular trade does not preclude the covenantor from himself carrying on the trade or *selling* the property free from restrictions (*m*). It seems

(*i*) (1899), 79 L. T. 684.
(*k*) *Wilkinson* v. *Rogers*, 2 De G. J. & S. 62.
(*l*) (1882), 51 L. J. Ch. 576.
(*m*) *Brigg* v. *Thornton*, [1904] 1 Ch. 395.

open to question whether, in the case of such a covenant as that in *Nicoll* v. *Fenning* (*n*), viz., not "to sell or convey" certain property without requiring the purchaser thereof to enter into certain restrictive covenants, the original covenantor is himself subject to the restrictions (*o*). In one case (*p*) Lord Romilly construed the word "let" not in the sense of demise but as meaning "permit," but it is conceived that this decision would not be followed. If the covenant relates to "adjoining" property, the restraint cannot be construed as affecting land which, although neighbouring or adjacent, is not absolutely contiguous (*q*). So, if the covenant is expressed to affect the property "opposite" to the plot conveyed, it only applies to the land immediately opposite, and of the width of the plot conveyed (*q*).

Ejusdem Generis.

On the other hand, the Court is not disposed to cut down the plain words of a covenant. Where, for example, the first branch of a covenant is in a comprehensive form, *e.g.*, prohibiting all trades whatever, and the second branch particularises certain prohibited trades, you cannot use the distinct words of the second clause so as to entirely strike out the former words from the covenant (*r*). Where, however, general words *follow* specific words, they may in some cases be limited to things *ejusdem generis* with those before enumerated. But the mere fact that general words follow specific words is certainly not enough to restrict the former unless you can see with reasonable plainness that that was the intention. Thus, where the latter part of the covenant applies to everything which can be in any sense

(*n*) 19 C. D. 258. This form of covenant is objectionable, since the original covenantor would be a necessary party to any action.

(*o*) *Jay* v. *Richardson*, 30 Beav. at pp. 570, 571.

(*p*) *Ind, Coope & Co.* v. *Hamblin* (1900), 84 L. T. 168.

(*q*) *Patching* v. *Dubbins* (1853), Kay, 1.

(*r*) *German* v. *Chapman*, 7 C. D. 277.

"an annoyance, nuisance, grievance or damage," you cannot cut down those words by reason of the fact that certain noxious or offensive trades have been specified in the first part of the covenant (*s*). If, however, the general words are ambiguous, the rule of *ejusdem generis* would, it is conceived, apply; and in a recent case, where the words were "any beerhouse, shop or any hotel," the word shop was construed as meaning beershop (*t*).

Implied Restriction.

Where the contract, as expressed in writing, would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual. There may be a case in which, in order to give effect to the clear object of the covenant, it is necessary to imply a restriction. Thus, in *Kimber* v. *Admans*, Vaughan Williams, L.J., said: "If I found myself in such a position that I could see no object in the covenant if it was simply limited to the bricks and mortar erection, I should have been disposed to put upon the word 'house' a meaning which would cover the *user* of the house, as distinguished from the physical erection" (*u*). Again, in *Hawes* v. *Scott* (*x*), Lord Lindley expressed the view that, "looking at the object of the restriction, you might be able to find that nothing inconsistent with the residential character of the neighbourhood should be erected."

It is obvious that it is more easy to imply a restriction against a grantor than against a grantee, for, as against a grantor, the principle applies that a man may not derogate

(*s*) *Tod-Heatley* v. *Benham* (1888), 40 C. D. at pp. 92, 93; *Wauton* v. *Coppard*, [1899] 1 Ch. 96, 97.

(*t*) *Formby* v. *Barker*, [1903] 2 Ch. 539. On the other hand, an exception in favour of "shops" was held not to include a tavern: *Coombs* v. *Cook* (1883), 1 Cab. & El. 75.

(*u*) [1900] 1 Ch. at p. 416.

(*x*) (1896) 40 Sol. J. 373; and see *Webb* v. *Fagotti*, *supra*.

from his own grant. Thus, where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on (*y*). The decision in *Leader* v. *Moody* (*z*) may be explained on this ground. In that case a lease had been granted of a box in an opera house, and it was held that the lessor was not at liberty afterwards to make structural alterations in the opera house with a view to adapting it for the use of religious services. Sir George Jessel (*a*) appears to have implied a restriction from the covenant for quiet enjoyment; but it is submitted that a covenant for quiet enjoyment only applies where there is either interference with title or possession in the technical sense, or some actual *physical*, as opposed to metaphysical, interference with the enjoyment of the thing demised (*b*).

Covenants as to Erections.

Where the covenant restrains the number of *houses* to be built on certain land, the question sometimes arises whether a particular erection is one house or two. In *Kimber* v. *Admans* (*c*) it was held that a block of flats constituted one house, while on the other hand it has been held that a building structurally divided into two tenements on different floors with no internal communication, common staircase, or common front door, in substance constituted two houses (*d*). Even where there is a common door it would seem that in the absence of internal com-

(*y*) *Aldin* v. *Latimer & Co.*, [1894] 2 Ch. at p. 444; *Cable* v. *Bryant*, [1908] 1 Ch. 259.

(*z*) 20 Eq. 145.

(*a*) *Ibid.* p. 152.

(*b*) *Jenkins* v. *Jackson* (1888), 40 C. D. 71; *Jaeger* v. *Mansions, Ltd.*, 87 L. T. 692.

(*c*) [1900] 1 Ch. 412.

(*d*) *Ilford Park Estates, Ltd.* v. *Jacobs*, [1903] 2 Ch. 522.

munication the same result would follow (*e*); and in *Snow* v. *Whitehead* (*f*), where two houses had been thrown together, but the only communication was on the ground floor, it was held that they were still two houses.

Building.

Where the covenant stipulates that no *building* shall be erected on the land, questions frequently arise as to whether a particular erection constitutes a building.

In *Morish* v. *Harris* (*g*) it was doubted whether a space enclosed by four walls and roofed over, in which guano and other manures were kept, was a building. In *Bowes* v. *Law* (*h*), James, L. J., held that the erection of a boundary wall was not a building, and in *Foster* v. *Fraser* (*i*) a similar decision was arrived at with reference to an advertisement hoarding. The question must, however, largely depend upon the context of the particular document. Thus, in *Child* v. *Douglas* (*k*), a wall 15 feet high was held to be a building.

A building is not necessarily limited to a structure of bricks and mortar. Thus, a structure of wood intended to be permanently used as a shop has been held to be a building (*l*), and so also has a trellis work screen (*m*), and a railway embankment (*n*). It is, however, safer to use the expression "building or other *erection*." The word erection would, it is conceived, include a structure which was not intended to be of a permanent character (*o*). It may be doubted whether a mere projection not forming a

(*e*) *Ibid.* at p. 524.
(*f*) 53 L. J. Ch. 885.
(*g*) (1865) L. R. 1 C. P. 155.
(*h*) (1870) 9 Eq. 636.
(*i*) [1893] 3 Ch. 158.
(*k*) Kay, 560.
(*l*) *Stevens* v. *Gourley* (1859), 7 C. B. N. S. 99.
(*m*) *Wood* v. *Cooper*, [1894] 3 Ch. 671.
(*n*) *Long Eaton Recreation Grounds* v. *Midland Railway*, [1902] 2 K. B. 574.
(*o*) *Pocock* v. *Gilham* (1883), 1 Cab. & El. 104.

portion of the main building of a house would be within a covenant not to erect any building beyond a certain line of frontage (*p*), but a bay window has been held to be a breach of such a covenant (*q*).

Covenants as to User.

Restrictions upon the user of land may be divided into three classes, viz.: (1) Covenants which prohibit any kind of trade or business; (2) Covenants which prohibit noisy and offensive trades; and (3) Covenants which prohibit some particular trade. The first two classes are entered into to preserve the character of the neighbourhood, while the object of the third class is generally to protect the covenantee from trade rivalry, and is more often found in leases than in conveyances of the fee (*qq*).

I. *Prohibition of all trades.*—Where it is intended to preserve the strictly residential character of the neighbourhood, the restriction should extend to business as well as trade. A restriction limited to trade would not prohibit either a school, a lunatic asylum, or a hospital. Every trade is a business, but every business is not a trade. It is not essential that there should be payment in order to constitute a business. Thus, the word business has been held to include a throat and chest hospital for poor persons (*r*), and a home for working girls (*s*); and it is quite clear that when the covenant is against exercising any business whatsoever, a school for boys or girls, even although only a day school, cannot be carried on (*t*).

An equally effectual way of prohibiting every kind of

(*p*) *Manners* v. *Johnson* (1875), 1 C. D. at pp. 678, 679; and cf. *London County Council* v. *Schewzik*, [1905] 2 K. B. 695.

(*q*) *Manners* v. *Johnson* (1875), 1 C. D. 673.

(*qq*) In *Hodgson* v. *Cappard* (1861), 30 L. J. Ch. 20, and again in *Catt* v. *Tourle* (1869), 4 Ch. 654, it was seriously argued that a restriction of this character in a conveyance was void as being in restraint of trade.

(*r*) *Bramwell* v. *Lacy* (1879), 10 C. D. 691.

(*s*) *Rolls* v. *Miller*, 27 C. D. 71.

(*t*) *Doe* v. *Keeling* (1813), 1 M. & S. 95; *Kemp* v. *Sober* (1851), 1 Sim. N. S. 517; *Wickenden* v. *Webster* (1856), 6 E. & B. 387.

business is to stipulate that buildings to be erected on the land shall not be used otherwise than as private dwelling-houses. A restriction of this character will prohibit a school (*u*), a charitable institution (*x*), a boarding-house for scholars (*y*), or a studio (*z*). The occupier of premises subject to this restriction will not, however, be restrained from selling furniture by auction, if such furniture belongs to the house (*a*). In *Russell* v. *Baber* (*b*), V.-C. Bacon held that a stable, which was appurtenant to a dwelling-house, was not a violation of a restriction of this kind.

II. *Prohibition of offensive trades.*—The construction of a covenant restraining the carrying on of offensive trades must, it is conceived, depend much on the situation of the premises (*c*). Thus, a fried fish shop has been held, in the case of a high-class residential neighbourhood, to be an offensive trade, although it is conceived that a different construction would be put on a similar covenant with regard to a house in Whitechapel (*d*). We have the authority of Lord Eldon (*e*) for the proposition that it cannot be contended that the business of a coach-builder is an offensive trade; and it has been held that a laundry is not "noisy, noxious or offensive" (*f*). So also it would seem that neither the trade of a licensed victualler (*g*), nor that of a butcher and slaughter-house keeper (*h*), is necessarily offensive. On the other hand, a wild beast show

(*u*) *Johnstone* v. *Hall* (1856), 2 K. & J. 414.
(*x*) *German* v. *Chapman*, 7 C. D. 271.
(*y*) *Hobson* v. *Tulloch*, [1898] 1 Ch. 424.
(*z*) *Patman* v. *Harland*, 17 C. D. 353.
(*a*) *Reeves* v. *Cattell* (1876), 24 W. R. 485.
(*b*) (1870) 18 W. R. 1021.
(*c*) *Gutteridge* v. *Munyard* (1834), 7 C. & P. 129; cf. *Sturges* v. *Bridgman* (1879), 11 C. D. at p. 865.
(*d*) *Duke of Devonshire* v. *Brookshaw*, 81 L. T. 83.
(*e*) *Bonnett* v. *Sadler* (1808), 14 Ves. at p. 527.
(*f*) *Knight* v. *Simmonds*, [1896] 1 Ch. at p. 661.
(*g*) *Jones* v. *Thorne* (1823), 1 B. & C. 715.
(*h*) *Cleever* v. *Bacon* (1887), 4 T. L. R. 27; *Rapley* v. *Smart*, W. N. (1894) 2.

is *per se* a "noisome and offensive trade" (*i*); the running of trains is a breach of a covenant not to carry on a noisy trade (*k*); and carrying on a boys' school is a "*disagreeable*" if not an "injurious or offensive noise or nuisance" (*l*).

The decision of Lord Denman in *Doe* v. *Bird* (*m*) that a private lunatic asylum was not an "offensive trade" turned on the use of the word trade, which he construed as restricted to buying and selling. In *Bramwell* v. *Lacey* (*n*) the terms of the covenant, which was described by Jessel, M. R., as the largest known to the law, restrained any "act or thing which may be or grow to the *annoyance*, damage, injury, prejudice or inconvenience of the neighbouring premises." Annoyance is a much wider term than nuisance, and includes anything which disturbs the reasonable peace of mind of an English householder, although it does not amount to a physical detriment to comfort (*o*). The decision in *Jones* v. *Thorne* (*p*), that a public-house was not an annoyance, would not, it is conceived, be followed. A school where dancing and music were taught would certainly be an annoyance (*q*), and would probably be held to be a nuisance. In *Harrison* v. *Good* (*r*), Bacon, V.-C., construed the word nuisance in a restrictive covenant as limited to a *legal* nuisance, but this was questioned by Lord Lindley in a later case (*s*), for if nuisance is used in the strict sense, there would be no object in inserting the covenant.

(*i*) *Hall* v. *Ewin*, 37 C. D. 74.
(*k*) *Long Eaton Recreation Grounds* v. *Midland Railway*, 50 W. R. 220.
(*l*) *Wauton* v. *Coppard*, [1899] 1 Ch. 92.
(*m*) (1834) 4 L. J. K. B. 52.
(*n*) 10 C. D. 691.
(*o*) Per Lord Bowen in *Tod-Heatley* v. *Benham*, 40 C. D. at p. 98; *Wood* v. *Cooper*, [1894] 3 Ch. 671.
(*p*) 1 B. & C. 715.
(*q*) Per Bacon, V.-C., in *Harrison* v. *Good* (1871), 11 Eq. at p. 353.
(*r*) 11 Eq. 338.
(*s*) *Tod-Heatley* v. *Benham*, 40 C. D. at p. 94.

III. *Prohibition of particular trades.*—Where the restriction is limited to some particular trade a difficulty sometimes arises from the fact that certain trades overlap one another. There are several decisions on this point which are somewhat difficult to distinguish, but the distinction appears to be that if substantially the whole of the prohibited trade is carried on, it is immaterial that this is done as ancillary to some other business; for instance, the business of a theatrical manager may include that of a retailer of wines and spirits (*t*); the business of a grocer may include that of a coffee-house keeper (*u*). On the other hand, if only a *portion* of the prohibited trade is carried on in connection with and as part of another distinct business, this would not be held to be a breach of the covenant (*x*).

Covenants as to Intoxicating Liquors.

The decisions with regard to covenants restricting the user of property for the sale of intoxicating liquors turn for the most part upon the question whether the holder of an off-licence comes within the particular prohibition. The Licensing Act of 1860 (*y*) introduced an entirely new system by authorising what are commonly known as "grocer's licences" for the sale of wines and spirits. Before that Act there were two distinct classes, viz., the wine merchant who sold wholesale (*z*), and the publican who sold by retail to be consumed on the premises. Obviously a grocer's establishment with an off-licence is not at all likely to be attended with the elements of disturbance, noise and offensiveness which sometimes attend a public-house. In *Feilden* v. *Slater* (*a*) it was held by

(*t*) *Buckle* v. *Fredericks*, 44 C. D. 244; *Fitz* v. *Iles*, [1893] 1 Ch. 77.

(*u*) *Lumley* v. *Metropolitan Rail. Co.* (1876), 34 L. T. 774; *Stuart* v. *Diplock*, 43 C. D. 343.

(*x*) *Bailey* v. *Skinner*, 42 Sol. J. 780.

(*y*) 23 Vict. c. 27. Off-licences for *beer* were common before 1860.

(*z*) *I.e.*, in quantities of two gallons or a dozen bottles.

(*a*) 7 Eq. 523.

James, V.-C., that the trade of a grocer holding an off-licence was a breach of a covenant not to use premises for the sale of spirituous liquors, but a year later the same judge held that a grocer with an off-licence was not a "seller by retail of wine and spirits" (*b*). The former decision was clearly right (*c*), but the latter would not now be followed in the case of a covenant entered into since 1860 (*d*). It has, however, been held in Ireland (*e*) that a grocer with an off-licence is not a "publican," and it is conceived that this decision would be followed. On the other hand, the expression "vintner" is not confined to one who sells wine to be consumed on the premises, because even prior to 1860 the freemen of the Vintners' Company enjoyed the special privilege of selling wine by retail to be consumed off as well as on the premises (*f*).

With regard to the sale of beer, it has been held that a restriction against keeping "a public-house for the sale of beer" (*g*) or a "beerhouse" (*h*) is not broken by the sale of beer under an off-licence. On the other hand, the word "beershop" applies to a house where beer is sold to be consumed off the premises (*i*), and the holder of an off-licence is clearly a "retailer of beer" (*k*). But neither the expression "beerhouse" nor "beershop" apply to the case of a private hotel (*l*), and a restriction against selling malt liquor is not broken by sale to members of a club (*m*).

(*b*) *Jones* v. *Bone* (1870), 9 Eq. 674.

(*c*) See also *Richardson* v. *Murphy*, [1899] 1 Ir. R. 248.

(*d*) *Buckle* v. *Fredericks*, 44 C. D. 244.

(*e*) *Cullen & Riall's Contract, In re*, [1904] 1 Ir. R. 206.

(*f*) *Wells* v. *Attenborough* (1871), 24 L. T. 312.

(*g*) *Pearse* v. *Coats* (1866), 2 Eq. 688.

(*h*) *L. & N. W. Rail. Co.* v. *Garnett* (1869), 9 Eq. 26.

(*i*) *Bishop of St. Albans* v. *Battersby* (1878), 3 Q. B. D. 359; *London and Suburban Land Co.* v. *Field*, 16 C. D. 645.

(*k*) *Thornewell* v. *Johnson*, 50 L. J. Ch. 641.

(*l*) *Duke of Devonshire* v. *Simmons* (1894), 11 T. L. R. 52.

(*m*) *Ranken* v. *Hunt* (1894), 10 R. 249.

CHAPTER X.

REMEDIES FOR ENFORCING RESTRICTIVE COVENANTS.

Damages at Common Law.

Where there is *legal privity—i.e.*, privity of contract, or, as between landlord and tenant, privity of estate—the breach of a restrictive covenant is, of course, the subject of an action for damages at common law. The original covenantor continues to be liable after assignment for the acts of his assigns, because all those who take from the first assignee do so in consequence of the voluntary act of the covenantor. The deed of covenant, however, sometimes expressly provides that the covenantor shall not be liable in damages for breaches of the covenant committed after he shall have ceased to have any interest in the property (*a*). A proviso of this nature, while it limits the personal liability of the covenantor, does not, of course, affect the efficacy of the restriction as creating a burden on the property. It has, moreover, been held that the covenantor is not personally liable for the acts of his assigns if the property has been taken from him compulsorily under statutory powers on the principle, *lex non cogit ad impossibilia* (*b*).

Where there is legal privity, it is conceived that mere laches, such as would bar the plaintiff's right to a mandatory injunction, would be no defence to an action for damages.

The only defence to such an action would either be

(*a*) *Gaskin* v. *Balls*, 13 C. D. 324; Key & Elph. Vol. I. p. 586. In the absence of express stipulation a purchaser cannot insist on a provision restricting his liability. See *Pollock* v. *Rabbits* (1882), 21 C. D. 466.

(*b*) *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180.

(A) acquiescence in the strict sense, or (B) the Statutes of Limitations, or (C) implied release. In order to establish acquiescence, which will deprive a man of his legal rights, there are five requisites. In the first place, the covenantor seeking to establish acquiescence must have made a mistake as to his legal rights. Secondly, he must have expended some money, or must have done some act on the faith of his mistaken belief. Thirdly, the covenantee, the possessor of the legal right, must know of the existence of his own right, which is inconsistent with the right claimed by the covenantor (*bb*). Fourthly, the covenantee must know of the covenantor's mistaken belief of his rights. Fifthly, the covenantee, the possessor of the legal right, must have encouraged the covenantor in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right (*c*).

With regard to the Statutes of Limitations, the period within which an action for breach of covenant may be brought is twenty years (*d*); but if the contract is not under seal the period is six years (*e*). In either case the statute runs not from the date of the contract but from the breach.

In the case of a covenant as to building it is clear that an action for damages would be barred after twenty years from the time when a building was erected in breach of the covenant, for in that case the covenant would be broken once and for all. But when the covenant restricts user of the property, the breach being continuous (*f*), it is difficult to see how the Statutes of Limitations can be successfully pleaded.

(*bb*) "Parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them," per V.-C. Turner, 9 Hare, at p. 16; but see *infra*, p. 97.

(*c*) *Willmott* v. *Barber*, 15 C. D. at p. 105; and cf. *Doe* v. *Allen* (1810), 3 Taunt. 78; *Griffin* v. *Tomkin* (1880), 42 L. T. 359.

(*d*) 3 & 4 Will. 4, c. 42, s. 3.

(*e*) 21 Jac. 1, c. 16, s. 3.

(*f*) *Doe* v. *Woodhouse*, 9 B. & C. 376.

It is, however, clear that even in the case of a restrictive covenant as to user a release or licence may be presumed. The benefit of the covenant can, of course, be released by the covenantee (*g*), and, in the absence of any express release, if there has been for a considerable period an uninterrupted user of the servient tenement in breach of the covenant, a waiver or release will be presumed. Thus, in *Gibson* v. *Doeg* (*h*), Pollock, C. B., said: "Where a breach of covenant has continued for upwards of twenty years and, with full knowledge of it, rent has been from time to time received, that fact may be left to the jury to say whether they will not presume a licence." That was a case between lessor and lessee, but the same principle applies to a restrictive covenant contained in a conveyance of the fee (*i*). If you find a long course of usage, which is wholly inconsistent with the continuance of the covenant relied upon, the Court infers some legal proceedings which have put an end to that covenant in order to show that the usage has been and is now lawful and not wrongful.

Penalty Clause.

In some cases a stipulation is inserted that a certain fixed sum shall be paid as the penalty for the breach of a restrictive covenant, although such a provision is very uncommon except in leases. The question whether a provision of this character is a common penalty clause, or is to be regarded as liquidated damages, does not depend upon whether the sum fixed is described as a penalty or as liquidated damages, but the nature of the stipulations with regard to which the sum is made payable must be regarded (*k*). If, however, the parties themselves call the sum made payable a penalty, the onus lies on them to show that it is payable as liquidated damages (*l*).

(*g*) *Keates* v. *Lyon*, 4 Ch. 218; *Master* v. *Hansard*, 4 C. D. 718.
(*h*) 2 H. & N. 623.
(*i*) *Hepworth* v. *Pickles*, [1900] 1 Ch. 108.
(*k*) *Kemble* v. *Farren* (1829), 6 Bing. 141.
(*l*) *Willson* v. *Love*, [1896] 1 Q. B. 626.

If the intention of the parties appears to be that the sum fixed is to be paid over and over again for every breach of the covenant (*m*), or if it applies to the breach of various stipulations, some of which may occasion serious and others less serious damage (*n*), then the stipulation is generally relieved against as a penalty. On the other hand, if there is only one event on which the liability to pay the sum depends, the stipulation is enforceable as an agreement for liquidated damages.

In *Coles* v. *Sims*, the case of a deed of mutual covenant, Turner, L. J., seems to have considered that if the stipulation were a claim for liquidated damages, and not a penalty, the Court would have no jurisdiction to grant an injunction (*o*). There does not seem to be any more recent decision with regard to a penalty clause in a restrictive covenant entered into between owners of the fee, but it is submitted that it would now be held that the covenantee was entitled to elect between his remedy by injunction and by liquidated damages, following the analogy of a number of decisions with regard to contracts in restraint of trade.

In the case of a lease it has been held that a provision for a penal rent in case a prohibited trade was carried on did not affect the right of the lessor to re-enter for breach of covenant (*p*), or to obtain an injunction restraining the breach (*q*).

Damages where no Legal Privity.

In some of the earlier cases it seems to have been assumed that there might be a liability to damages at common law even where the defendant was not privy to the covenant (*r*), and in *Nicoll* v. *Fenning* Vice-Chancellor

(*m*) *Reynolds* v. *Bridge* (1856), 26 L. J. Q. B. 17.

(*n*) *Pye* v. *British Automobile Commercial Syndicate*, [1906] 1 K. B. at p. 429.

(*o*) 5 D. M. & G. at p. 11.

(*p*) *Weston* v. *Managers of the Metropolitan Asylum District* (1882), 9 Q. B. D. 404.

(*q*) *Hanbury* v. *Cundy* (1887), 58 L. T. 155.

(*r*) *Jones* v. *Bone*, 9 Eq. at p. 677; *Kelsey* v. *Dodd*, 52 L. J. at p. 39.

Bacon appears to have awarded damages against the defendant Prosser, who had done nothing himself in violation of the covenant, and was not a party to it (*s*). The decision in *Hall* v. *Ewin* (*t*), however, clearly shows that in the absence of legal privity the defendant cannot be made liable for damages in any action at law. Lord Cairns' Act gave the Courts of equity the power of giving a plaintiff damages by way of alternative relief, *i.e.*, in lieu of an injunction, and this is not confined to cases in which the plaintiff could recover damages at law (*u*). But it is clear that damages under Lord Cairns' Act cannot be given against a person who has not been party to the breach of covenant.

Injunction.

The more usual way of enforcing a restrictive covenant is of course by injunction, which, prior to Lord Cairns' Act, was the only relief which could be given by a Court of equity. In the absence of privity of contract or (as between landlord and tenant) privity of estate a restrictive covenant can only be enforced by an injunction to restrain an infringement of the plaintiff's right, or damages in lieu of an injunction (*x*).

As previously pointed out, an injunction may be granted not merely against the person who is actually committing a breach of the restriction, but against anyone who makes himself an accessory to the breach (*y*).

In considering in what cases a restrictive covenant will

(*s*) 19 C. D. 258.

(*t*) 37 C. D. 81.

(*u*) *Eastwood* v. *Lever*, 4 D. J. & S. at p. 128, per Turner, L. J.; *Alexander* v. *Mansions Proprietary, Ltd.*, 16 T. L. R. 431.

(*x*) "An amount of acquiescence less than what would be a bar to all remedy may operate at the discretion of the Court, and induce it to give damages instead of an injunction." Per Fry, L. J., in *Sayers* v. *Collyer*, 28 C. D. at p. 110; *Kilbey* v. *Haviland*, 19 W. R. 698.

(*y*) *Evans* v. *Davis*, 10 C. D. 747.

be enforced by injunction and how the right may be lost, it is most material to distinguish between the case where the plaintiff has the right to sue at law and the case where he has merely the right to sue in equity (*z*). Where there is legal privity and an injunction is sought merely in aid of the plaintiff's legal rights, the injunction is a matter of course if the legal right be proved to exist. "If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done, and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the *contract between the parties*. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance by the Court of that negative bargain which *the parties have made, with their eyes open, between themselves*" (*a*). It is conceived that this celebrated *dictum* of Lord Cairns only applies where there is privity of contract between the parties, or at any rate legal privity as in the case of landlord and tenant, and this would seem to be the view of Lord Justice Vaughan Williams (*b*). The *dictum* of Sir Edward Fry in *Richards* v. *Revett* (*c*) that the Court will proceed against an assignee of the land in precisely the same way as against the original covenantor cannot, it is submitted, be supported on principle, although it was cited with approval by Parker, J., in a recent case (*d*).

Where there is legal privity the Court will grant an injunction, although there is no proof of actual damage to

(*z*) See *Osborne* v. *Bradley*, [1903] 2 Ch. at p. 451.

(*a*) *Doherty* v. *Allman*, 3 A. C. at p. 720.

(*b*) *Formby* v. *Barker*, [1903] 2 Ch. at pp. 553, 554.

(*c*) 7 C. D. at pp. 226, 227. Fitzgibbon, L. J., takes the same view: *Craig* v. *Greer*, [1899] 1 Ir. R. at p. 295; and see also *Cooke* v. *Gilbert* (1892), 8 T. L. R. 382.

(*d*) *Elliston* v. *Reacher*, [1908] 2 Ch. at p. 395.

the plaintiff (*e*), and although the plaintiff has himself contributed to an alteration in the character of the neighbourhood (*f*). Nor would the plea of acquiescence be a defence to the claim for an injunction in such a case unless it amounted to such acquiescence as we have already considered in the case of an action for damages (*g*), that is to say, an encouragement to the defendant to commit the breach complained of and thereby spend money or alter his position (*h*). Where, however, there is no legal privity and the plaintiff's right is in equity only, different considerations apply, and the plaintiff may be barred by an acquiescence which would not entitle him to relief at law (*hh*).

Acquiescence.

It is unfortunate that the expression "acquiescence" is not always used in the same sense. "If a party having a right stands by and sees another *dealing with the property* in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word 'acquiescence'" (*i*). In this sense, acquiescence means delay, coupled with knowledge of the act complained of and absence of protest or remonstrance, but it is not clear whether, when Lord Cottenham speaks of "dealing with the property," he refers to some dealing which involves expense or alteration in the position of the defendant.

Acquiescence must always be distinguished from mere delay, but it is sometimes used in the sense of implied waiver or assent, although the defendant has not been encouraged thereby to alter his position. In the case of

(*e*) *Kemp* v. *Sober*, 1 Sim. N. S. at p. 820; *Tipping* v. *Eckersley* (1855), 2 K. & J. 270; *Dickenson* v. *Grand Junction Canal Co.*, 15 Beav. at p. 270.

(*f*) *Manners* v. *Johnson*, 1 C. D. 673.

(*g*) *Kemp* v. *Sober*, *supra*.

(*h*) *Supra*, p. 90.

(*hh*) Where there is "*a right only in equity* equitable considerations, if sufficiently weighty, will make it the duty of the Court not to grant equitable relief," per Cotton, L. J., 32 C. D. at p. 578.

(*i*) *Duke of Leeds* v. *Amherst* (1846), 2 Ph. at p. 123.

the erection of a prohibited building, there is no difficulty in applying the doctrine of acquiescence, and in *Eastward* v. *Lever* (*k*), the Court refused a mandatory injunction where the plaintiff had taken no steps until after the erection of the house (*l*). So where a trade is carried on in contravention of a covenant, and the plaintiff stands by while the defendant establishes a trade and gets a valuable connection, the same principle applies (*m*); but it is conceived that the plaintiff is not barred by mere delay in taking action if the defendant has not altered his position on the faith of the plaintiff's acquiescence. In *Sayers* v. *Collyer* (*n*), there was a general scheme affecting certain land which prohibited the carrying on of any trade, and both plaintiff and defendant claimed under purchasers who had acquired their lots subject to this scheme. The defendant, in breach of this restriction, carried on a beer-shop on his lot for three years, when the plaintiff at length commenced an action. The beer-shop of the defendant was only four doors from the house where the plaintiff lived, and the plaintiff was aware of the fact, and himself bought beer at the defendant's house. The Court refused an injunction on the ground of acquiescence, and also refused to give damages in lieu of an injunction under Lord Cairns' Act. Lord Bowen said that "a plaintiff will not be saved from having his action dismissed with costs unless he has suffered tangible damage, or unless he is justified in bringing his action to ask for a declaration of title or to try a right" (*o*). It does not appear that this case has ever been followed (*oo*).

(*k*) 4 D. J. & S. 114; and see also *Gaskin* v. *Balls*, 13 C. D. 324; *Kilbey* v. *Haviland*, 19 W. R. 698.

(*l*) It is conceived that the decision in *L. C. & D. Rail. Co.* v. *Bull*, 47 L. T. 413, would not now be followed.

(*m*) *Kelsey* v. *Dodd*, 52 L. J. Ch. at p. 37.

(*n*) 28 C. D. 103.

(*o*) *Ibid.* at p. 109.

(*oo*) See, however, *dicta* of Farwell, J., in *Osborne* v. *Bradley*, [1903] 2 Ch. at p. 456.

In *Duke of Northumberland* v. *Bowman* (*p*), where there was a similar covenant, and there had been a delay of fourteen months in taking action, Kekewich, J., granted an injunction, but in that case it was not proved that the breach had been brought to the notice of the Duke or his agent. In a later case, before the same judge (*q*), the defendant and his predecessor in title had for twelve years carried on a fried fish shop in contravention of a restrictive covenant, and notice was clearly brought home to the plaintiff. Nevertheless an injunction was granted, Kekewich, J., saying: "There is a covenant binding on the owner of the house. The covenant is there, and there has been no waiver by the covenantee." This seems a remarkable decision if it is correctly reported. It is submitted that after twelve years a release ought to be presumed even in a case where there is legal privity (*r*).

In *Barrett* v. *Blagrave* (*s*), Lord Eldon refused an injunction after eleven years, although he seems to have assumed that an action might have been brought on the covenant at law (*t*). In that case, however, there was strong evidence of consent by the plaintiffs to the mode in which the house was used.

In a recent case the question was discussed, but left undecided, whether a plaintiff is bound by acquiescence who, although he has constructive notice of a restriction, did not in fact know of its existence. Lord Cottenham, in defining acquiescence, spoke of "knowledge or *means of knowledge*," and it is apprehended that, if the right is merely equitable, a plaintiff who has had means of knowledge would be barred.

Although acquiescence in the erection of a building

(*p*) (1887) 56 L. T. 773.

(*q*) *Duke of Devonshire* v. *Brookshaw*, 81 L. T. 83.

(*r*) *Supra*, p. 91; and see *dictum* of Lord Eldon in *Roper* v. *Williams*, T. & R., pp. 22, 23.

(*s*) 6 Ves. 104.

(*t*) Clearly a false assumption, since the defendant was an underlessee, and there was no legal privity.

would probably preclude the covenantee from objecting to erections which are mere incidents to that building (*u*), acquiescence in a minor breach does not prevent a plaintiff from complaining of a greater and more serious breach (*x*). The covenantee may suffer things to pass without notice which do not cause him any particular injury, but that does not deprive him of his equity to use the covenant for his protection when the breach of it immediately affects the enjoyment of his house (*y*).

Alteration in the Character of the Neighbourhood.

If, in the case of a general scheme, the whole character of the neighbourhood has been altered so that the object for which the covenant was originally entered into must be considered at an end, then the covenantee is not allowed to come into the Court for the purpose merely of harassing and annoying some particular man, when the Court can see that he is not doing it *bonâ fide* for the purpose of effecting the object for which the covenant was originally entered into (*z*). This doctrine originated in two decisions of Lord Eldon, both given in the year 1822.

In the *Duke of Bedford* v. *The Trustees of the British Museum* (*a*), an ancestor of the Duke of Bedford, having a mansion-house, called Southampton House, and land consisting of open fields in the district of Bloomsbury, in the year 1675 sold and conveyed a piece of land, being the site on which the British Museum now stands, to Mr. Montagu, and Mr. Montagu entered into a covenant with the vendor not to erect any buildings on it except a mansion-house, which was afterwards called Montagu House, and suitable offices. In the year 1800 Southamp-

(*u*) *Eastwood* v. *Lever*, 4 D. J. & S. at p. 127.

(*x*) *Meredith* v. *Wilson*, 69 L. T. at p. 338.

(*y*) *Western* v. *Macdermott*, 2 Ch. at p. 74; and cf. *Osborne* v. *Bradley*, [1903] 2 Ch. at p. 456; *Jackson* v. *Winnifrith*, 47 L. T. 243.

(*z*) *German* v. *Chapman*, 7 C. D. 279.

(*a*) 2 M. & K. 552.

ton House was pulled down to make room for streets and buildings, which were erected on its site. In 1822 the trustees of the British Museum, who had acquired Montagu House, were about to erect certain buildings in the gardens, and the Duke, considering that this would be an infringement of the covenant, applied for an injunction.

Lord Eldon, with the assistance of Sir T. Plumer, held that it was not a case in which a Court of Equity would grant relief. The principal ground for the decision was that, on the construction of the deed, it was apparent that the covenants were entered into for the better protection and enjoyment of Southampton House; and since the Bedford family had pulled down Southampton House, thereby, as Lord Eldon puts it, "destroying the very purpose for which this covenant was inserted," it was immaterial whether the covenant was broken or not (*b*). The decision, however, also rested on the ground that the covenants were entered into on the assumption that all the property between Gower Street and Brunswick Square would remain open fields (*c*). Sir T. Plumer said: "The question is whether from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all control which was applicable to the property in its former state." The Court of Appeal in Ireland have held that the principle of this decision only applies where the alteration in the character of the neighbourhood has resulted from the acts or omissions of the covenantee (*d*). But the true principle would seem to be that, whatever the explanation of the altered state of things may be, if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused (*e*). This view is opposed to the legal doctrine that contractual obligations cannot be varied

(*b*) *Ibid.* p. 568. See explanation of this case in *Kemp* v. *Sober*, 1 Si. N. S. 521; *Osborne* v. *Bradley*, [1903] 2 Ch. 452.

(*c*) 2 M. & K. at pp. 563, 572.

(*d*) *Craig* v. *Grier*, [1899] 1 I. R. 258.

(*e*) *Knight* v. *Simmonds*, [1896] 2 Ch. at p. 298, per Lord Lindley.

by any subsequent change of circumstances (*f*). The other decision of Lord Eldon above referred to, viz., *Roper* v. *Williams* (*g*), would appear to be wrongly reported on the facts. According to the statement of the facts in the report, the plaintiff Roper was a purchaser who was seeking to enforce restrictive covenants entered into by Williams, his vendor, in respect of land retained by him (Williams). But the judgment of Lord Eldon is only intelligible on the assumption that the plaintiff was a vendor who had taken covenants from all his purchasers of a similar character to secure the uniformity of the buildings to be erected on the lots sold.

Lord Hatherley on two occasions referred to *Roper* v. *Williams* as a case of covenants taken by a vendor as quasi-trustee for all the purchasers, and even pointed out that in the converse case, where the covenants are entered into by a landlord or vendor, a tenant or purchaser could not be considered to hold his right for the benefit of all the other tenants (*h*). It must therefore be assumed either that the report is wrong, or that Lord Eldon based his judgment on a complete misconception of the facts.

The view taken by Lord Eldon was that Roper was trustee of the benefit of the covenant, and that as he had failed in some instances to enforce it, the benefit was gone. "In every case in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them to have the general plan enforced for the benefit of all" (*i*).

In *Peek* v. *Matthews* (*k*) there was a building scheme for the erection of a row of houses, and covenants were entered into to provide uniformity in mode of building, so that

(*f*) *Elves* v. *Crofts* (1850), 10 C. B. 241; *Sayers* v. *Collyer*, 28 C. D. at p. 108, per Lord Bowen.

(*g*) T. & R. 18.

(*h*) *Patching* v. *Dubbins*, Kay, at p. 10; *Peek* v. *Matthews*, L. R. 3 Eq. at p. 518.

(*i*) Cf. *Mayor of Plymouth* v. *Martin* (1884), 1 T. L. R. 5.

(*k*) L. R. 3 Eq. 515.

the enjoyment which springs from regularity in a series of dwellings might be preserved. It was held by Lord Hatherley (then V.-C. Wood) that since the common scheme had not been adhered to, the original vendor could no longer enforce the covenants.

Even, however, where there is a building scheme it is now well established that the mere fact that the restrictions have not been enforced in all cases does not destroy the whole benefit of the covenants as to the rest of the estate (*l*).

The fact that the covenants have been broken in some remote part of the estate does not prevent the plaintiff from enforcing them as to property in his own neighbourhood where the general character of the property has not been changed.

Moreover, where there is no general scheme (*m*), or where the vendor reserves a power to modify the restrictions (*n*), a covenantee does not lose his right to enforce a covenant against A. merely because he has not enforced a similar covenant against B., and he may even waive the covenant as to part of A.'s property and enforce it as to the rest.

Breaches of Covenant by the Plaintiff.

Where there is a general scheme, if the plaintiff has himself committed breaches of the restrictions, or actively encouraged such breaches by others, he cannot come to the Court and ask for an injunction. But minor breaches by the plaintiff will not disentitle him to relief against serious breaches by other purchasers (*o*); and the breach of a trivial building restriction will not preclude him from enforcing an important stipulation (*p*).

(*l*) *German* v. *Chapman*, 7 C. D. 271; *Knight* v. *Simmonds*, [1896] 2 Ch. 294.

(*m*) *Osborne* v. *Bradley*, [1903] 2 Ch. 446.

(*n*) *Earl of Zetland* v. *Hislop*, 7 A. C. at p. 460.

(*o*) *Jackson* v. *Winnifrith*, 47 L. T. 243; *Meredith* v. *Wilson*, 69 L. T. 336.

(*p*) *Hooper* v. *Bromet*, 89 L. T. 37.

CHAPTER XI.

THE IMPORTANCE OF RESTRICTIVE COVENANTS IN CONNECTION WITH THE SALE OF LAND.

Effect of Restrictive Covenants on Contracts of Sale.

In this chapter it is proposed to discuss the operation of restrictive covenants as affecting the relations of vendor and purchaser of land. We have already considered the extent to which a purchaser is affected with notice of a restrictive covenant, and therefore the subject may for the purposes of this chapter be divided into four headings, viz., (1) the duty of the vendor to disclose the existence of the restriction; (2) to what extent the restriction may be the subject of compensation; (3) the right of the vendor to indemnity; and (4) the liability of the vendor after conveyance under his covenants for title.

Duty of the Vendor to disclose.

Leaseholds.—The earlier cases with regard to the disclosure of restrictive covenants were for the most part decided, with regard to leasehold property, either on a contract to assign a lease or grant an underlease. At first it seems to have been assumed that the maxim *Caveat emptor* applied, and that the purchaser before completion had constructive notice of the covenants in the lease. At any rate, the early cases in which the purchaser was granted relief are all cases of direct misrepresentation by the vendor as to the nature of the covenants in the lease, *e.g.*, a tied house described as a free house (*a*).

(*a*) *Hartley* v. *Penhall*, 1 Peake, 178; *Jones* v. *Edney*, 3 Camp. 285; *Flight* v. *Booth*, 1 Bing. N. C. 370.

In *Flight* v. *Barton* (*b*) in the year 1832, it was considered doubtful whether the purchaser (in that case an intending underlessee) had constructive notice of unusual covenants in the head lease; but the Court granted relief on the ground that the plaintiff was expressly informed of the business the respondent intended to carry on upon the premises, and his silence was treated as amounting to misrepresentation. Although in some of the cases the purchaser was given a reasonable opportunity of inspecting the lease (*c*), it was distinctly laid down, not only by Baron Alderson (*d*), but by such eminent equity lawyers as Lord St. Leonards (*e*) and Lord Hatherley (*f*), that in the absence of misrepresentation a purchaser who has notice that the property is held under a lease "cannot object that he had no notice of any covenant therein contained."

It was not until the year 1877 that the Court of Appeal decided (*g*) that a purchaser is not affected with notice of unusual covenants unless he has "had a fair opportunity of ascertaining for himself the provisions of the original lease." This was decided with reference to an agreement for an underlease; but the decision was extended to the case of an agreement to purchase an existing lease in the year 1888 (*h*), and applies to sales by auction as well as to sales by private contract (*i*).

It is now established that the burden of making the disclosure is on the vendor, who must either give the purchaser express notice of the covenants, or see that the purchaser has had an opportunity of examining the lease for himself; and this is so even where the contract provides

(*b*) 3 M. & K. 282.

(*c*) *Cosser* v. *Collinge* (1832), 3 M. & K. 283.

(*d*) *Pope* v. *Garland* (1841), 4 Y. & C. 394.

(*e*) *Martin* v. *Cotter* (1846), 3 Jo. & Lat. 496, at p. 506.

(*f*) *Grosvenor* v. *Green* (1859), 28 L. J. Ch. 173.

(*g*) *Hyde* v. *Warden* (1877), 3 Ex. D. 72, at p. 80.

(*h*) *Reeve* v. *Berridge* (1888), 20 Q. B. D. 523; *Davis and Carey, In re* (1888), 40 C. D. 601.

(*i*) *White and Smith's Contract*, [1896] 1 Ch. 637.

that the vendor's title is accepted by the purchaser (*k*). It has been decided by the Court of Appeal in a recent case (*l*) that the actual production of the lease is not sufficient, unless either the purchaser has in fact perused it, or the circumstances are such that he is estopped from saying that he had not notice of its contents (*m*). If the conditions provide that the lease may be *inspected at the office of the vendor's solicitor*, and that the purchaser, whether availing himself of this opportunity or not, shall be deemed to have notice of the covenants in the lease, it is presumed that the purchaser would be bound if he is in fact given an opportunity of inspecting the lease (*n*).

Freeholds.—The earliest case in which the existence of a restrictive covenant was held to be an objection to the title to freehold property was *Bristow* v. *Wood* (*o*), in the year 1844. A contract to sell freeholds being *primâ facie* a contract to sell free from incumbrances, it was objected by the purchaser that the restriction was a burden on the land in the nature of an incumbrance, and V.-C. Knight-Bruce refused to force the title upon him.

In *Phillips* v. *Caldcleugh* (*p*) the restrictions were contained in a deed prior to the root of title, but were referred to in the deed forming the root of title. The conditions provided that the purchaser should not investigate or take any objection in respect of the title prior to the commencement of the abstract, but it was held that notwithstanding this condition the purchaser could recover his deposit. The purchaser was entitled to an unencumbered freehold, and could not be compelled to take a freehold "encumbered by a covenant."

(*k*) *Haedicke and Lipski's Contract, In re*, [1901] 2 Ch. 666.

(*l*) *Molyneux* v. *Hawtrey*, [1903] 1 K. B. 487.

(*m*) *Ibid.* pp. 494, 497.

(*n*) See and distinguish *Re White and Smith's Contract*, [1896] 1 Ch. 637.

(*o*) 14 L. J. Ch. 50.

(*p*) L. R. 4 Q. B. 159.

The same principle applies even when the abstracted deeds do not contain any reference to the restrictions, and the purchaser discovers the existence of the covenant by inquiries *aliunde* (*q*).

A general condition that the property is sold subject to all easements, &c., "and also subject to any matter or thing affecting the same, whether disclosed at the time of sale or not," is not sufficient to protect the vendor. He must, if he wishes to protect himself, use a condition pointing to the blot much more specifically. It is not, however, necessary to state the nature of the restrictions in the contract of sale. If property is declared to be sold subject to the provisions contained in a deed which is specially referred to *without mentioning its contents*, and which deed can be examined before the sale by the purchaser, he is bound by everything contained in that deed. This proposition, it will be observed, involves two conditions, viz., (1) that the contents of the deed are not stated, and (2) that an opportunity is given to the purchaser of inspecting the deed. As to the first condition, if the vendor makes an untrue statement as to the effect of the deed, the purchaser is not bound by the condition, for a material misrepresentation vitiates the contract altogether (*r*). If the vendor states that which is untrue as a fact, he cannot get the assistance of a Court of equity because at the same time he said, "You may go and look at some other document by which you might ascertain what I said was untrue." Moreover, if the vendor purports to give minute information as to the contents of the deed, he must give all the material information. If the vendor himself states what the contents of the deed are, the purchaser is not bound to examine the deed, but may reasonably trust to the representation of

(*q*) *Nottingham Tile Co.* v. *Butler*, 16 Q. B. D. 778; *Cox and Neve's Contract*, [1891] 2 Ch. 109.

(*r*) *Camberwell and South London Building Society* v. *Holloway* (1879), 13 C. D. at p. 762; *Re Davis and Carey*, 40 C. D. at p. 609.

it (*s*). If there is a partial and fragmentary statement as to the contents, the withholding of that which is not stated may make that which is stated absolutely false (*t*).

As to the second condition, viz., that the purchaser must have a reasonable opportunity of inspecting the deed, it has been held that if the conditions are not published beforehand, but are merely read out at the auction, the purchaser, if he has not seen the deed in question, is not bound (*u*). If, however, the conditions are published a reasonable time before the sale, and the vendor merely invites the purchaser to come and see the deed containing the restrictions and judge for himself, the purchaser is affected with notice; and if the deed itself does not set out the covenants, but refers to an earlier deed which is also open to the inspection of the purchaser, it seems that he is affected with notice of the covenants in the earlier deed (*v*).

Compensation.

As a general rule, if the purchaser when he enters into the contract knows of the existence of restrictive covenants, he has no ground of complaint, at any rate if he knows they are existing incumbrances which the vendor has no power to discharge (*x*).

But if the vendor expressly contracts to make "a marketable title," parol evidence of the knowledge of the purchaser as to the existence of the restrictions is not admissible (*y*).

If the purchaser has no notice of the restrictions, the existence of a restrictive covenant is a fatal objection to

(*s*) *Cox* v. *Coventon* (1862), 31 Beav. 378.

(*t*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. at p. 403, per Lord Cairns; *Re Marsh and Granville* (1883), 24 C. D. at p. 15, per Fry, J.; and cf. *Jones* v. *Rimmer* (1880), 14 C. D. 588.

(*u*) *Dougherty* v. *Oates* (1900), 45 Sol. J. 119.

(*v*) *Childe and Hodgson's Contract* (1906), 54 W. R. 234.

(*x*) *Ellis* v. *Rogers*, 29 C. D. at pp. 666, 670 and 671.

(*y*) *Cato* v. *Thompson*, 9 Q. B. D. 616.

title, but the purchaser may waive his rights by taking possession or remaining in possession of the land after discovering the existence of the restrictions (*z*).

If there is no condition as to compensation, or if the condition precludes compensation, it is clear that, although the purchaser may rescind the contract (*a*), neither vendor nor purchaser can claim to have the contract carried out subject to compensation (*b*).

There is, however, very little authority as to how far a restrictive covenant may be the subject of compensation where there is an express condition providing for compensation in the case of mistakes or omissions. In *Phillips* v. *Caldcleugh*, Lush, J., said (*c*) : "Even if this incumbrance might be such an error only as could have been compensated for under the ninth condition, it is not shown what the incumbrance is." In *Flight* v. *Booth* (*d*) there was actual misrepresentation as opposed to mere non-disclosure, and misrepresentation vitiates the whole contract, and entitles the purchaser to repudiate (*e*). In any case, however, it is presumed that the vendor could not treat the defect as coming within the compensation clause if the purchaser would not in effect be getting the subject-matter which he agreed to buy (*f*). Lord Esher in one case (*g*) said that a condition providing for compensation could not apply to a defect, "the compensation in respect of which could not be ascertained," and

(*z*) *Re Gloag and Miller's Contract* (1883), 23 C. D. 320.

(*a*) *Higgins and Hitchman's Contract*, 21 C. D. 95 ; *Ebsworth and Tidy's Contract* (1889), 42 C. D. 23 ; *Cox and Neve's Contract*, [1891] 2 Ch. 109 ; *Nisbet and Potts' Contract*, [1906] 2 Ch. 386.

(*b*) *Rudd* v. *Lascelles*, [1900] 1 Ch. 815.

(*c*) L. R. 4 Q. B. at p. 162.

(*d*) 1 Bing. N. C. 370.

(*e*) *Nottingham Patent Tile Co.* v. *Butler*, 16 Q. B. D. at p. 790 ; *Hollinwell* v. *Seccombe*, [1906] 1 Ch. at p. 434.

(*f*) *Fawcett and Holmes*, 42 C. D. at pp. 157 and 159 ; *Brewer* v. *Hankin*, 80 L. T. 127.

(*g*) *Fawcett and Holmes*, 42 C. D. at p. 156.

Jessel, M. R., has laid down that it is "almost impossible to assess compensation for covenants of this nature" (*h*). Nevertheless, compensation is in fact assessed, as we have seen in the case of sales to public bodies under the Lands Clauses Act (*i*), and there does not seem any reason why there should be more difficulty in assessing compensation for a restrictive covenant than for an easement.

There are at least two reported cases in which a purchaser has obtained compensation in respect of an undisclosed easement (*j*), and it is submitted that if the purchaser elects to treat the restriction as the subject of compensation under an express condition, he is entitled so to do.

Form of Conveyance.

It was held by V.-C. Kindersley, in the year 1855 (*k*), that in an action for specific performance by the vendor, a purchaser who bought without notice must elect either to rescind the contract or to execute a conveyance comprising the covenants. The judgment in this case would seem to imply that, even if the purchaser had notice, yet in a vendor's action he could not be compelled to enter into the covenants without being given the option of rescinding the contract (*l*). On the other hand, it is clear that if the action is brought by the purchaser he cannot compel the vendor to convey, except upon the terms that the conveyance contains the usual covenant to indemnify the vendor (*m*). It is true that in a recent case (*n*) Kekewich, J., following in this respect the decision of Pearson, J., in

(*h*) *Cato* v. *Thompson*, 9 Q. B. D. 618.

(*i*) *Supra*, p. 36.

(*j*) *Ramsden* v. *Hirst*, 4 Jur. N. S. 200; *Vowles* v. *Bristol Building Society*, 44 Sol. J. 592; and see *Rudd* v. *Lascelles*, [1900] 1 Ch. at p. 320.

(*k*) *Lukey* v. *Higgs*, 24 L. J. Ch. 495.

(*l*) This is commented on in Dart, V. & P. at p. 632.

(*m*) *Moxhay* v. *Inderwick*, 1 De G. & Sm. 708.

(*n*) *Wallis and Bernard's Contract*, [1899] 2 Ch. 515.

Hardman v. *Child* (*o*), held that a purchaser is entitled to a conveyance, subject only to the restrictive covenants mentioned in the contract, whether or not he has notice of others. But that case was decided on a vendor and purchaser summons, and the learned judge expressed the opinion (*p*) that he would not enforce specific performance on those terms. Having regard, however, to the fact that the summons was taken out by the purchaser, it is submitted that the decision is a doubtful one. In *Monckton & Gilzean* (*q*) the conveyance to the vendor contained no reference to the restriction in question; while in *Hardman* v. *Child* (*r*) the defence of hardship was not raised.

If the contract mentions that the sale is made subject to certain restrictive covenants, it is not, it is conceived, necessary to stipulate that the purchaser shall enter into a covenant of indemnity. The vendor's right to indemnity is implied as in the case of the sale of an equity of redemption or a share in a partnership. But although the covenant entered into by the purchaser is in form a covenant to observe and perform the restrictions, it is merely an indemnity, and gives the vendor no right to enforce the restrictions against the purchaser unless he, the vendor, is himself sued by third parties (*s*), or possibly in the case where the vendor retains other portions of an estate subject to the same scheme (*t*).

It has recently been decided by the Court of Appeal (*u*) that the purchaser is entitled to preface the covenant entered into by him with the words "with the object and intention of affording the vendor, his heirs, executors and

(*o*) 28 C. D. 712; and see Dart, V. & P. at p. 576.

(*p*) [1899] 2 Ch. at p. 521.

(*q*) 27 C. D. 555.

(*r*) (1885), 28 C. D. 712.

(*s*) *Harris* v. *Boots*, [1904] 2 Ch. 376.

(*t*) This would clearly not be so if there were no covenant by the purchaser. See *King* v. *Dickeson*, 40 C. D. 596.

(*u*) *Poole and Clarke's Contract*, [1904] 2 Ch. 173.

administrators, a full and sufficient indemnity in respect of the restrictive covenants but not further or otherwise."

Covenants for Title.

It remains to be considered whether, if the conveyance is not expressed to be subject to any restriction, and the purchaser is, after completion, restrained by some third party from carrying on a trade or building on the property, he has any remedy against the vendor. It is submitted that he has, because, although his liability to be restrained depends on his having notice, either actual or constructive, it is well established that notice to a purchaser of a defect of title does not bar his right to recover under the covenants for title entered into by the vendor in the conveyance (*x*). The right must, of course, depend upon the precise nature of the vendor's covenants for title, and for the present purposes it must be assumed that the vendor has conveyed as beneficial owner, and that the restriction was created either by the vendor himself or by some person through whom he derives title otherwise than by purchase for value. It is submitted in the first place that an injunction restraining the purchaser from using the property in a particular manner is a "lawful interruption or disturbance" within the meaning of the covenant for quiet enjoyment implied by sect. 7 of the Conveyancing Act, 1881.

The *dictum* of Willes, J., in *Dennett* v. *Atherton* (*y*), is opposed to this view, and lays down the proposition that "a proceeding interfering only with a particular *mode of enjoyment of the land* or part of it, but not with the title or possession, is not a breach." But that *dictum*, although

(*x*) *Great Western Railway* v. *Fisher*, [1905] 1 Ch. 322, and cases there cited. The doubts expressed by Lord Collins and Romer, L. J., in *Jones* v. *Lavington*, [1903] 1 K. B. 258, where the point was not argued, appear to be unfounded.

(*y*) L. R. 7 Q. B. 326.

cited with approval by Charles, J., in *Spurling* v. *Bantoft* (*z*), is quite inconsistent with the rule laid down by the Court of Appeal in the year 1884, that the covenant is broken "when the ordinary and lawful enjoyment of the land is substantially interfered with" (*a*). In *Tebb* v. *Cave* (*b*), Buckley, J., treated the *dictum* of Willes, J., as in effect overruled, and although *Tebb* v. *Cave* is a doubtful authority (*c*), it is not necessary to extend the interpretation of the covenant for quiet enjoyment so far as was done in that case in order to hold that an injunction against a particular user is a breach of the covenant. It has been held that an easement not disclosed in the conveyance, and exercised in such a way as to disturb the purchaser in the ordinary enjoyment of the land, is a breach of the covenant for quiet enjoyment (*d*), and the same principle must apply to a negative covenant, which the present Master of the Rolls has described as being "in the nature of an equitable easement." In *Turner* v. *Moon* (*e*), which was also the case of an easement, Joyce, J., found as a fact that the plaintiff had "not been evicted or disturbed in any way," and there had been "no actual interference with the enjoyment" of what the deed purported to convey. The only damage suggested in that case was that the exercise of the right of way destroyed "the privacy and amenity" of the plaintiff's property. In that case there was a private road in existence which was stated in the conveyance to be subject to certain rights of way, but the right of way in question was omitted. It was held that there was no breach of the covenant for quiet enjoyment, but that there was a breach of the covenant against "all such estates, claims, incumbrances, and demands other than those subject to which the conveyance is expressly made."

(*z*) [1891] 2 Q. B. 393.
(*a*) *Sanderson* v. *Mayor of Berwick* (1884), 13 Q. B. D. at p. 551.
(*b*) [1900] 1 Ch. at p. 647.
(*c*) *Davis* v. *Town Properties, Ltd.*, [1903] 1 Ch. at p. 805.
(*d*) *Sutton* v. *Baillie*, 65 L. T. 528.
(*e*) [1901] 2 Ch. 825.

It is submitted that this decision, so far as the covenant for quiet enjoyment is concerned, does not apply to the case of a restrictive covenant.

In *Great Western Railway* v. *Fisher* (*f*), where the right of way actually interfered with the works constructed by the plaintiff, it does not appear to have been argued whether there was a breach of the covenant for quiet enjoyment, or of the covenant against incumbrances, but in awarding damages Buckley, J., followed *Rolph* v. *Crouch* (*g*), which was the case of a covenant for quiet enjoyment. The question whether the existence of a restrictive covenant is a breach of the covenant for quiet enjoyment, or of the covenant against incumbrances, claims, and demands is material on the question of damages. In the case of the covenant against incumbrances there is a breach, once and for all, when the conveyance is executed, and the right of action is barred at the end of twenty years. The measure of damages is the difference between the purchase price and the value of the premises as conveyed, such difference being caused by the defect in the title. On the other hand, in the case of a covenant for quiet enjoyment, there is no breach until actual disturbance, and the damages are measured by the value at the time of the disturbance (*h*).

Probably, however, the distinction is of no great practical importance.

Registered Land.

In the case of registered land, it is enacted by sect. 16, sub-sect. 3, of the Land Transfer Act, 1897, that in the absence of special stipulation a vendor of land, with an absolute title, "shall not be required to enter into any covenant for title." This is an extraordinary provision,

(*f*) [1905] 1 Ch. 316.
(*g*) L. R. 3 Exch. 44.
(*h*) Rawle on Covenants, 244 245; *Bunny* v. *Hopkinson*, 27 Beav. 565.

because, as we have already seen, although easements may be registered (*i*), they are not deemed to be incumbrances, and the rights of the owner of the dominant tenement are not affected by non-registration. Consequently a man who purchases from the owner of land registered with an absolute title is in the same position with regard to easements after completion as if the conveyance were expressed to be made "subject to all rights of way and other easements" (*k*). Evidently the draftsman of the Land Transfer Act, 1897, was not aware that after completion a vendor could be sued on his covenants for title in respect of an easement to which the conveyance is not expressed to be subject (*l*).

A vendor of land registered with a possessory title can only be required to covenant against "estates and interests excluded from the effect of registration," which seems to refer to the provisions of sects. 8 and 32 of the 1875 Act, with reference to interests "adverse to or in derogation of the title of such first registered proprietor and subsisting or capable of arising at the time of the registration of such proprietor." It is, however, to be observed that in sect. 8 the words are "estate *right* or interest," and in sect. 32 "*right* or interest," whereas in sect. 16 of the Act of 1897 the word "right" is omitted. Easements are treated under sect. 18 of the principal Act under the heading "rights," and it is therefore conceived that they are not included in the covenant for title. This construction is borne out by the provision as to a statutory declaration in sect. 16, sub-sect. 1 (ii.), of the 1897 Act.

If this construction be correct, it follows that a trans-

(*i*) Land Transfer Rules, 1903, r. 215.

(*k*) These words may be inserted in an ordinary conveyance only where the contract stipulates that the property is sold and will be conveyed subject to easements, &c. See *Gale* v. *Squier* (1876), 4 C. D. 226; (1877), 5 C. D. 625.

(*l*) *Sutton* v. *Baillie*, 65 L. T. 528; *Turner* v. *Moon*, [1901] 2 Ch. 825; *Great Western Railway* v. *Fisher*, [1905] 1 Ch. 316.

feree of registered land has no remedy in the case of easements which are not discovered until after completion, unless, of course, there has been fraud on the part of the vendor.

The same principle applies to restrictive covenants, and it is conceived that in the case of registered land no action can be brought under the covenants for title.

INDEX.

Acquiescence,
barring a legal right, 90.
an equitable right, 95—97.

Adjoining property, meaning of, 80.

Affirmative covenant, 15.

Alteration in character of neighbourhood, 98 *et seq.*

Annexation of benefit of covenant, 40 *et seq.*

Annoyance, meaning of, 86.

Antecedent scheme, 54.

Assignment
of benefit, 4, 39—47.
of burden, 4, 5.

Beerhouse, meaning of, 88.

Benefit
of contract, assignment of, 4, 39—47.
runs with land at law, 6, 44.

Breach of covenant. *See* Chapter X.

Brewers' covenants. *See* Tied houses.

Building, meaning of, 83.

Building estates. *See* Chapter VII.

Building restrictions, 77—79.

Burden
of restrictions, nature of, 10—17.
how objected, 25—38.

Business, meaning of, 84.

Chattels, application in case of, 3, 15.

Club, 88.

Collateral
covenants in lease, 20, 67.
in conveyance, 18, 21.
in mortgages, 23.

Compensation
in case of easements, 108.
"restrictive" covenants, 36, 106—108.

Conditions of sale, implication from, 51 *et seq.*

Conscience of assignee, doctrine as to, 2, 12—15.

Construction of covenant, 77—88.

Constructive notice
affecting lessees, 27, 28.
purchasers, 28—32.

Conveyance subject to restrictions, 108.

Conveyancing Acts, 28.

Damage, right where no, 95.

Damages
at common law, 74, 89—91, 93.
under Lord Cairns' Act, 93—96.

Demise, covenants implied by, 75.

Derogation from grant, 46, 81, 82.

Duty of vendor to disclose, 102 *et seq.*

Easement, analogy to, 15, 16, 21, 36, 111.

Ejusdem generis, rule as to, 80.

Election between remedies, 92.

Enjoyment. *See* Quiet.

Equitable
estates, 25.
rights, enforcement of, 12, 95.

Erection,
covenants as to, 82.
distinction between, and user, 77.

Estate, meaning of, 43.

Flats, covenants as to, 60.

Grant, restriction not created by, 16.

House, meaning of, 82.

Impersonal form of covenant, 19, 20.

Implied restriction, 81.

Incorporeal hereditament, 45.

Incumbrance, whether restriction is, 33, 113.

Indemnity, covenant as to, 29, 109.

Injunction, 93, 95.

Inspection of deed by purchaser, 103, 104.

Interest in land, whether restriction an, 33—35, 113.

Intoxicating liquors, 87, 88. *And see* Tied house.

Lands Clauses Act, 35—37.

Land Transfer Acts. *See* Registered title.

Leases, restrictive covenants in, 20, 64—76.

Lessee
bound by restriction, 27, 28.
covenants by, 66—76.
is an assign, 45.

Lessor, covenants by, 20, 65, 66.

Let, meaning of, 20, 80.

Licensed victualler, meaning of, 85.

Limitations, Statute of, 26, 38, 90.

Mandatory injunction, 96.

Merger, 46.

Mortgagee, not necessary party to action, 44, 45.

Mortgages, covenants in, 23—27.

Mortmain, Statutes of, 37.

Mutual covenant, deeds of, Chapter VI.

Notice,
importance of, 27.
whether it creates a right, 8, 14.

Nuisance, meaning of, 86.

Offensive trade, meaning of, 85.

Opposite, meaning of, 80.

Origin of doctrine. *See* Chapter I.

Overlapping trades, 87.

Paramount title, 37.

Particulars, scheme inferred from, 56.

Penalty clause, 91, 92.

Perpetuities, rule against, 1.

Personal covenants, 18—24, 72.

Plan, exhibition of, 59.

Privity
of contract, 3—5.
of estate, 6, 7.

Proviso for re-entry, 72.

Purchase for value without notice, 25—27, 34, 35.

Quiet enjoyment, covenant as to, 75, 82, 111.

Re-entry. *See* Proviso for.

Registered title, 32—35, 112—114.

Release of covenant, 91.

Rentcharge, 45.

Restraint of trade, 65, 84.

Reversion,
benefit, when annexed to, 69.
burden, when annexed to, 65.

Scheme, when implied, 56—62.

Shop, meaning of, 81.

Sub-sales, 46.

Sub-scheme, 62.

Successive sales, 59—62

Tied house covenants,
construction of, 87, 88.
in grant of fee, 21—23.
in leases, 67—72.
in mortgages, 23, 24.

Title,
covenants for, 110 *et seq.*
paramount, 37.

Touch or concern, 65, 66.

Ultra vires, 37.

Underlessee, liability of, 74—76.

User, 77—79, 84 *et seq.*

Variation, power of, 58.

Vendor and purchaser, importance of restrictions as between, Chapter XI.

Vendor and Purchaser Act, 28, 31.

Waiver of restriction, 97, 99.

LONDON: PRINTED BY C. F. ROWORTH, 88, FETTER LANE, E.C.

Pollock's Digest of the Law of Partnership.—With Forms and an Appendix on the Limited Partnerships Act, 1907, together with the Rules and Forms, 1907, 1909. By Sir FREDERICK POLLOCK, Bart., Barrister-at-Law. *Demy* 8*vo.* 1909. *Price* 10*s. cloth.*

Pollock's Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law. *Eighth Edition.* By Sir FREDERICK POLLOCK, Bart., Barrister-at-Law, Author of "Principles of Contract," "A Digest of the Law of Partnership," &c. *Demy* 8*vo.* 1908. *Price* 1*l.* 5*s. cloth.*

Harnett's Handbook on the Law of Mortgages.—By E. ST. CLAIR HARNETT, Barrister-at-Law. *Royal* 12*mo.* 1909. *Price* 6*s. cloth.*

Martin's Record Interpreter.—A Collection of Abbreviations, Latin words and names used in English Historical Manuscripts and Records. Compiled by C. T. MARTIN, B.A., F.S.A. *Second Edition. Demy* 8*vo.* 1910. *Price* 15*s. cloth.*

Burge's Commentaries on Colonial and Foreign Laws Generally and in their Conflict with each other and with the Law of England.—*New Edition.* By A. WOOD RENTON, Puisne Judge, Ceylon, and G. G. PHILLIMORE, Barrister-at-Law. *Seven Vols. Royal* 8*vo.* (*Vols. I. & II.*, 1907—1908, *now ready.*) *Price, net,* 10*l.* 10*s. cloth.*

Aske's Law relating to Custom and the Usages of Trade.—By ROBERT WILLIAM ASKE, LL.D. *Demy* 8*vo.* 1909. *Price* 16*s. cloth.*

Lawes' Law of Compensation for Industrial Diseases.—By THORNTON LAWES, Barrister-at-Law. *Demy* 8*vo.* 1909. *Price* 7*s.* 6*d. cloth.*

Hall's Children Act, 1908.—Being a Third Edition of the Law relating to Children. By W. CLARKE HALL and ARNOLD H. F. PRETTY, Barristers-at-Law. *Demy* 8*vo.* 1909. *Price* 6*s. cloth.*

Keith's Responsible Government in the Dominions.—By ARTHUR BERRIEDALE KEITH, Barrister-at-Law, and of the Colonial Office. *Demy* 8*vo.* 1909. *Price* 10*s. cloth.*

Dicey's Conflict of Laws.—A Digest of the Law of England with reference to the Conflict of Laws. *Second Edition.* By A. V. DICEY, K.C., Hon. D.C.L. *Royal* 8*vo.* 1908. *Price* 1*l.* 10*s. cloth.*

Beal's Cardinal Rules of Legal Interpretation.—*Second Edit.* By EDWARD BEAL, Barrister-at-Law. *Royal* 8*vo.* 1908. *Price* 20*s. cloth.*

Jolly's Restrictive Covenants affecting Land.—By W. ARNOLD JOLLY, Barrister-at-Law. *Demy* 8*vo.* 1909. *Price* 5*s. cloth.*

Wrottesley and Jacobs' Criminal Appeals.—The Law and Practice of Criminal Appeals. By FREDERIC JOHN WROTTESLEY and BERTRAM JACOBS, Barristers-at-Law. *Demy* 8*vo.* 1910. *Price* 20*s. cloth.*

Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. *Eighteenth Edition.* By MAURICE POWELL, Barrister-at-Law. *Two Vols. Demy* 8*vo.* 1907. *Price* 2*l.* 2*s. cloth.*

Roscoe's Digest of the Law of Evidence and the Practice in Criminal Cases (chiefly on Indictment).—*Thirteenth Edition.* By HERMAN COHEN, Barrister-at-Law. *Demy* 8*vo.* 1908. *Price* 1*l.* 11*s.* 6*d. cloth.*

Talbot and Fort's Index of Cases Judicially Noticed, 1865 to 1905.—*Second Edition.* By M. R. MEHTA, Barrister-at-Law. *Royal* 8*vo.* 1908. *Price* 1*l.* 18*s. cloth.*

Digest of Cases, Overruled, Approved, or otherwise specially considered in the English Courts.—With extracts from the Judgments. By W. A. G. WOODS and J. RITCHIE, Barristers-at-Law. *Three Vols. Royal* 8*vo.* 1907. *Price* 5*l.* 5*s. cloth.*

Decennial Digest (The).—Being the Digest of English Case Law from 1898 to 1907, inclusive, forming a Supplement to Mews' Digest of English Case Law, 16 vols. By EDWARD MANSON, Barrister-at-Law. *Two Vols. Royal* 8*vo.* 1908. *Price* 3*l.* 3*s. cloth.*

*** *A Catalogue of New Law Works gratis on application.*

Williams' Law and Practice in Bankruptcy.—*Ninth Edition.* By EDWARD WM. HANSELL, assisted by A. ROMER MACKLIN, Barrister-at-Law. *Royal* 8*vo.* 1908. *Price* 1*l.* 10*s. cloth.*

Robinson's Law relating to Income Tax.—*Second Edition.* By ARTHUR ROBINSON, Barrister-at-Law. *Royal* 8*vo.* 1908. *Price* 25*s. cloth.*

Robertson on the Crown.—The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government. By G. STUART ROBERTSON, Barrister-at-Law. *Royal* 8*vo.* 1908. *Price* 1*l.* 18*s. cloth.*

Heywood & Massey's Lunacy Practice.—By ARTHUR HEYWOOD and ARNOLD MASSEY, Solicitors. *Third Edition.* By the AUTHORS and RALPH C. ROMER, First Class Clerk in the Office of the Masters in Lunacy. *Royal* 8*vo.* 1907. *Price* 25*s. cloth.*

Shirley's Selection of Leading Cases in the Common Law.—With Notes. *Eighth Edition.* By RICHARD WATSON, Barrister-at-Law. *Demy* 8*vo.* 1908. *Price* 16*s. cloth.*

Warburton's Selection of Leading Cases in the Criminal Law.—With Notes. *Fourth Edition.* By HENRY WARBURTON, Barrister-at-Law. *Demy* 8*vo.* 1908. *Price* 12*s.* 6*d. cloth.*

Strahan's General View of the Law of Property.—*Fifth Edition.* By J. A. STRAHAN and J. SINCLAIR BAXTER, Barristers-at-Law. *Demy* 8*vo.* 1908. *Price* 12*s.* 6*d. cloth.*

Smith's Practical Exposition of the Principles of Equity, illustrated by the Leading Decisions thereon.—*Fourth Edition.* By H. ARTHUR SMITH, Barrister-at-Law. *Demy* 8*vo.* 1908. *Price* 1*l.* 1*s. cloth.*

Smith's Analysis of the Principles of Equity.—By H. ARTHUR SMITH, Barrister-at-Law. *Demy* 8*vo.* 1909. *Price* 5*s. cloth.*

Barham's Student's Text-Book of Roman Law.—*Second Edition, enlarged.* By C. N. BARHAM, Barrister-at-Law. 12*mo.* 1908. *Price* 3*s.* 6*d. cloth.*

Beddoes' Concise Treatise on the Law of Mortgage.—*Second Edition.* By W. F. BEDDOES, Barrister-at-Law. *Demy* 8*vo.* 1908. *Price* 12*s.* 6*d. cloth.*

Williams' Law relating to Legal Representatives.—Being a Concise Treatise on the Law of Executors and Administrators. By SYDNEY E. WILLIAMS, Barrister-at-Law. *Demy* 8*vo.* 1908. *Price* 9*s. cloth.*

Cornish's District Councils.—A concise Guide to their Powers and Duties. By H. D. CORNISH, Barrister-at-Law. *Demy* 8*vo.* 1908. *Price* 7*s.* 6*d. cloth.*

Davey's Poor Law Settlement and Removal.—By HERBERT DAVEY, Barrister-at-Law. *Demy* 8*vo.* 1908. *Price* 9*s. cloth.*

Emanuel's Law relating to Dogs.—By MONTAGUE R. EMANUEL, Barrister-at-Law. *Demy* 12*mo.* 1908. *Price* 3*s.* 6*d. cloth.*

Wright's French Civil Code, translated into English, with Notes Explanatory and Historical.—By E. BLACKWOOD WRIGHT, LL.D., Author of "The Law of Principal and Agent." *Royal* 8*vo.* 1908. *Price* 25*s. cloth.*

Theobald's Concise Treatise on the Law of Wills.—*Seventh Edition.* By H. S. THEOBALD, K.C. *Royal* 8*vo.* 1908. *Price* 1*l.* 15*s. cloth.*

Woodfall's Law of Landlord and Tenant.—With a full Collection of Precedents. *Eighteenth Edition.* By W. H. AGGS, Barrister-at-Law. *Royal* 8*vo.* 1908. *Price* 1*l.* 18*s. cloth.*